A

Tetuan Khana & Co (sued as a firm) v Saling bin Lau Bee Chiang & Ors and other appeals

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02(NCVC)(W)-219–02 OF 2017, J-02(W)-220–02 OF 2017 AND J-02(W)-221–02 OF 2017
IDRUS HARUN, HASNAH HASHIM AND YEOH WEE SIAM JJCA
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Civil Procedure — Judgments and orders — Reliefs granted by trial judge not what plaintiffs prayed for — Whether judge exceeded his jurisdiction — Whether court had power to grants reliefs that suited the justice of the case — Whether trial judge's copying/adoption of chunks of plaintiff's submissions rendered his judgment liable to be set aside — Whether judge fully appreciated the evidence law and facts affecting the whole trial and exercised his own independent analysis and conclusions before coming to a decision — Whether sole reason that a substantial part of one party's submissions was adopted/copied by the trial judge insufficient to render his whole judgment bad

Civil Procedure — Parties — Death of defendants before start of trial — Trial judge proceeded with trial and allowed plaintiff's claim against all defendants including those who died — Whether trial judge should have commenced trial only after all proper persons representing the estates of the deceased defendants had been substituted as parties to the action — Whether fact that the deceased defendants were unrepresented at the trial rendered the judgment/orders made against them a nullity for breach of the rules of natural justice

Partnership — Liabilities of partners — Whether partner liable for wrongdoings of firm before he became partner — Partner contended he was not liable to restitute trust monies which firm dealt with before he became partner — Whether so long as firm had continuing obligation to account for and reimburse trust for monies dissipated the firm and its partners remained liable regardless of when they had become partners — Partnership Act 1961 ss 11 & 19(1)

I The instant decision concerned only the appeals by Messrs Khana & Co ('D4') ('Appeal No 219'), Ramlan bin Adong and 12 others ('Appeal No 220') and Dinesh Kanavaji a/l Kanawagi ('Dinesh') (Appeal No 221'). The common respondents ('the plaintiffs') in the three appeals were beneficiaries under the Linggiu Valley Orang Asli (Jakuns) Trust ('the trust') which was created pursuant to a High Court order and deed of trust to manage compensation

monies that were paid to the *orang asli* of three villages who lost their ancestral lands when a huge part of Linggiu Valley was acquired by the Johor State Government for the construction of a dam. A group ('the applicants') representing the affected villagers appointed Kanawagi a/l Seperumaniam ('D1') — who was then practising as the sole-proprietor of D4 — to sue the state government for compensation. The High Court awarded the applicants RM26.5m as compensation. By the time the appeal process against the award concluded five years later, the compensation sum together with interest had ballooned to RM38,554,111.92 ('the total compensation'). The High Court ordered RM22m of that sum ('the trust fund') to be paid into an account of the trust for the benefit of its beneficiaries and the balance RM16,554,111.92 to be paid to D4 for distribution to the applicants after deduction of legal fees, costs, consultation fees and expenses. A deed of trust was drawn up stating that the trust fund was to be managed by D1, two villagers (Tok Batin Adong bin Kuwau ('D2') and Abdul Rahman bin Abdullah ('Abdul Rahman')), the Director General of the Orang Asli Affairs Department ('the DG') and one other person who was not yet named. Some years later, the plaintiffs sued D1, D2, a village headman named Tok Batin Daud bin Kadir ('D3') and D4 ('the defendants') for committing various acts of breach of trust and breach of fiduciary duties in relation to the trust's funds. The plaintiffs alleged that in breach of the trust deed, the trustees never gave any account of how the RM16,554,111.92 and the trust fund had been used or managed; that D2, D3 and Abdul Rahman were paid unaccounted-for monies from the total compensation; that the DG was never made a trustee and that the number of trustees managing the trust had always been less than four. Inter alia, the plaintiffs sought the following reliefs: (a) that HSBC (M) Trustee Bhd ('HSBC') be made the sole trustee of the trust in place of the existing trustees; (b) that D1, D2 and their servants and agents be prohibited from dealing in any manner with the trust's property; (c) that D1 and D4 provide HSBC with an audited statement of accounts regarding the trust funds; (d) that D3 account for all monies he had received from D1 and D4; and (e) that the defendants pay the plaintiffs damages and also the sums of RM1m and RM2.2m (which amount was paid to another villager named Hamzah) to the trust. After a full trial, the High Court found that the defendants (excluding D3), including Dinesh, had breached their duties as trustees/constructive trustees in relation to the trust's monies and ordered them to pay various sums to the trust and its beneficiaries and also to the plaintiffs 'for abusing and mismanaging' the trust funds. The court also declared that D3 was never a trustee and that HSBC should replace D1 and D2 as the sole trustee but only when the court had made a direction to that effect upon the application of the plaintiffs and/or the receiver and manager ('R&M') who had been appointed in a related suit to manage the trust. The parties made the following arguments at the hearing of the appeals.

Appeal No 220

The plaintiffs argued that the 13 appellants who claimed to represent the

A estates of D2 and D3 (both of whom died before the trial started in the High Court) had no locus standi to prosecute the appeal because they were never made parties to the suit. Accordingly, Appeal No 220 should be struck out. Although the plaintiffs had obtained an order from the Court of Appeal to substitute D2 and D3 with their estates the pleadings were never amended to B formalise the change nor was a copy of the substitution order served on the appellants or the personal representatives of the deceased defendants. As a result, the appellants contended, the estates of D2 and D3 were never represented at the trial and therefore the trial court's decision attaching liability to D2 and D3 was a nullity for breach of the rules of natural justice.

C **Appeal Nos 219 and 221**

The plaintiffs contended that D4's payment of RM2.2m (out of the compensation monies it received) to the wife of a villager named Hamzah in consideration for his help in obtaining the compensation from the state D government and for introducing D2 and D3 to D1 was a wanton and reckless dealing with the compensation monies and should be repaid to the trust. Dinesh argued that since D4 had disbursed the entire sum of RM16,554,111.92 in the year 2000 before he became a partner of the firm in 2004, he could not be held liable to restitute that amount either to the trust or E to the plaintiffs. He said pursuant to ss 11 and 19(1) of the Partnership Act 1961 he could not be liable for anything the firm had done before he became a partner. The appellants contended that the judgment of the trial court should be expunged because the trial judge had extensively copied/adopted the submissions of the plaintiffs without giving due consideration to the evidence F and submissions of the appellants. They also contended that the trial judge acted without jurisdiction in granting orders and declarations that were never sought for by the plaintiffs.

Held, unanimously: (a) allowing Appeal No 220 and setting aside the High G Court's decision/orders in respect of D2 and D3 and/or their estates; and (b) with regard to Appeal Nos 219 and 221, dismissing the appeals against liability but allowing, in part, the appeals against the reliefs granted by the High Court by ordering that: (i) all references to the liability of D2 and D3 be deleted; (ii) HSBC replace the R&M as sole trustee of the trust within two H months and if HSBC declined the appointment, the respondents be at liberty to apply for the appointment of an alternative trustee; (iii) D1 and D4 do pay to the trust RM2.2m and any other sum they were found liable to pay to the trust as determined by HSBC or other court appointed alternative trustee following a study of the audited accounts of the trust; and (iv) D1 and D4 do I also pay the plaintiffs such damages as was identified and confirmed after the audited accounts had been submitted to HSBC or such court appointed alternative trustee:

(1) **Appeal No 220:** The trial judge erred in proceeding with the trial when he knew full well that the plaintiffs' appeal in respect of their application

to substitute the estates of D2 and D3, deceased, as parties to the action was pending before the Court of Appeal ('COA'). Subsequently, upon being notified that the COA had granted the substitution order, the trial judge did not give any directions to ensure that the personal representatives of D2 and D3, deceased, were in court until the time he delivered his decision in the case against them. Such a decision made in breach of the rules of natural justice was a nullity and the decision/order of the trial court had to be set aside. The plaintiffs' claim against D2 and D3 and/or their estates was, in effect, therefore dismissed (see paras 57–58).

(2) **Appeal No 220:** On being granted the substitution order by the Court of Appeal, the plaintiffs ought to have, but failed, to serve the substitution order and the amended writ and statement of claim on the estates of D2 and D3. Since the estates were originally not parties to the suit, they had to be made parties and served with the amended pleadings before they could defend the claim. The court also noted that there was no proof that the judgment of the trial court was served either on the estates of the two deceased persons or on the 13 appellants. Although it was argued that the 13 appellants were fully aware of the trial proceedings, that did not relieve the plaintiffs of their onus of serving the substitution order and the amended pleadings on the 13 appellants (see paras 40–44, 48 & 50).

(3) **Appeal Nos 219 and 221:** Even though the plaintiffs' action was not based on fraud, the cause of action was for breach of trust and constructive trust concerning the misuse, mismanagement and misappropriation of trust funds. Therefore, pursuant to ss 22(1)(a) and (2) of the Limitation Act 1953, the action was not barred by the six-year limitation period under s 6(2). Furthermore, for so long as the audited accounts were not rendered to the plaintiffs or the R&M and/or the alternative trustee to be appointed by the court, it was a continuing cause of action involving a running account of the subject monies which survived the six-year limitation period (see para 68).

(4) **Appeal Nos 219 and 221:** The trial judge did not err in deciding that there was a continuing obligation by D4 to compensate the plaintiffs for all losses incurred as a result of the firm's refusal and/or failure to account for the RM16,554,111.92. The firm's failure to account for the sums received on behalf of its client in its accounts did not cease to exist by virtue of the incoming or outgoing of an individual. Section 11 of the Partnership Act 1961 provided that a firm, as opposed to an individual partner, was obliged to make good any loss or injury caused to any person acting in the course of the business of the firm. So long as sums which rightly belonged to the trust fund were not paid back by the firm, and for so long as audited accounts were not rendered by the firm to the plaintiffs, the firm and its partners (including Dinesh) were liable for

such debts and/or obligations even if Dinesh had only joined the firm on 2 January 2004. From that date, Dinesh was liable as a partner for any act or omission which was the legal obligation of the firm for as long as such obligation had not been discharged (see paras 115–117).

(5) **Appeal Nos 219 and 221:** Although the trial judge adopted chunks of the submissions of the plaintiffs in his judgment, he had considered all the oral and documentary evidence adduced before him thoroughly and the cases of both parties in totality and in great detail. He had fully appreciated the facts, the evidence and the law and had independently made his own analysis of the evidence, arrived at his own findings and then made his decision and orders based on the law. The judge was more convinced by the evidence adduced by the plaintiffs' witnesses, whom he found to be more credible. He found the defendants' witnesses, in particular D1, Hamzah and Dinesh, were untruthful and lacked credibility. He therefore held that the plaintiffs had proven their case. Although it was not a good practice for a judge to copy and/or adopt more of one party's submissions that, by itself, could not be the basis to impugn and strike down the whole judgment. The judge had applied his mind objectively to the case before him and there was no judicial misappreciation or lack of appreciation of the facts and the law. The trial judge was not plainly wrong and his judgment was valid and ought to be preserved (see paras 122–123).

(6) **Appeal Nos 219 and 221:** The trial judge had departed from the reliefs pleaded for by the plaintiffs and had given other reliefs which he thought to be appropriate. It was clear that the plaintiffs had mainly sought for audited accounts to be submitted by the defendants and payment of any sums that needed to be paid. It was premature for the judge to have ordered various specific sums to be paid by various defendants to the plaintiffs before the audited accounts were obtained as there was a possibility that inaccurate sums of money could be paid without a proper audit. While the trial judge's findings on liability were correct, he ought not to have granted the varied reliefs (see para 129, 136 & 138–139).

(7) **Appeal Nos 219 and 221:** The trial judge rightly held that the defendants had no authority to pay RM2.2m out of the RM16,554,111.92 to Hamzah and his wife, Sa'adiah, for two reasons: (a) the trust order only allowed for payment of 'legal fees, costs, consultation fees and expenses'. There was no evidence that Hamzah was a lawyer or a consultant who was entitled to such payment, more so when there was no legitimate invoice or bill to require such monies to be paid; and (b) the defendants never obtained the consent of the 52 *orang asli* regarding the payment. The trial judge did not err in holding that the defendants had breached fiduciary duties as trustees/constructive trustees by misusing, mismanaging or misappropriating trust funds and that they were liable to

reimburse the trust (see paras 94 & 99).

(8) **Appeal Nos 219 and 221:** Without the DG being made a trustee as required by the trust order, the first trustees ought to have applied to court to dispense with the DG as trustee but this was not done. The trial judge was not wrong in concluding that the first trustees had a free hand over the compensation monies and had also breached cll 8.1 and 8.2 of the trust deed by not rendering proper audited accounts of the trust funds (see paras 82–83).

[Bahasa Malaysia summary

Keputusan ini hanya berkenaan rayuan oleh Tetuan Khana & Co ('D4') ('Rayuan No 219'), Ramlan bin Adong dan 12 yang lain ('Rayuan No 220') dan Dinesh Kanavaji a/l Kanawagi ('Dinesh') ('Rayuan No 221'). Responden ('plaintif') dalam ketiga-tiga rayuan tersebut adalah benefisiari di bawah Amanah Lembah Linggiu Orang Asli (Jakun) ('amanah tersebut') yang telah diwujudkan menurut perintah Mahkamah Tinggi dan surat ikatan amanah untuk menguruskan wang pampasan yang dibayar kepada orang asli dari tiga kampung yang kehilangan tanah nenek moyang mereka apabila sebahagian besar Lembah Linggiu diperoleh oleh kerajaan negeri Johor untuk pembinaan empangan. Satu kumpulan ('pemohon') mewakili penduduk kampung yang terjejas melantik Kanawagi a/l Seperumaniam ('D1') — yang ketika itu mengamalkan sebagai pemilik tunggal D4 — untuk menyaman kerajaan negeri untuk pampasan. Mahkamah Tinggi mengawardkan pemohon RM26.5 juta sebagai pampasan. Pada masa proses rayuan terhadap award itu selesai lima tahun kemudian, jumlah pampasan bersama dengan faedah telah meningkat kepada RM38,554,111.92 ('jumlah pampasan'). Mahkamah Tinggi memerintahkan RM22 juta daripada wang itu ('dana amanah') dibayar ke dalam akaun amanah untuk faedah benefisiari dan baki RM16,554,111.92 dibayar kepada D4 untuk pengagihan kepada pemohon selepas potongan yuran undang-undang, kos, yuran perundingan dan perbelanjaan. Surat ikatan amanah telah dibuat dengan menyatakan bahawa tabung amanah diuruskan oleh D1, dua orang penduduk kampung (Tok Batin Adong bin Kuwau ('D2') dan Abdul Rahman bin Abdullah ('Abdul Rahman')), Ketua Pengarah Jabatan Hal Ehwal Orang Asli ('DG') dan satu lagi orang yang belum dinamakan. Beberapa tahun kemudian, plaintif menyaman D1, D2, ketua kampung bernama Tok Batin Daud bin Kadir ('D3') dan D4 ('defendan') kerana melakukan pelbagai tindakan pecah amanah dan pelanggaran duti fidusiari berhubung dengan dana amanah. Plaintif mendakwa bahawa dengan pelanggaran surat ikatan amanah itu, pemegang amanah tidak pernah memberitahu tentang bagaimana RM16,554,111.92 dan tabung amanah telah digunakan atau diuruskan; bahawa D2, D3 and Abdul Rahman telah dibayar wang tergantung dari jumlah pampasan; bahawa DG tidak pernah menjadi pemegang amanah dan bahawa bilangan pemegang amanah yang mengurus amanah adalah selalu kurang dari empat. Antara lain, plaintif

memohon relif berikut: (a) bahawa HSBC (M) Trustee Bhd ('HSBC') dibuat sebagai pemegang amanah tunggal amanah menggantikan pemegang amanah yang sedia ada; (b) bahawa D1, D2 dan pekerja dan ejennya dilarang daripada berurusan dengan apa-apa cara dengan harta amanah; (c) bahawa D1 dan D4 menyediakan HSBC dengan penyata akaun teraudit berhubung dana amanah; (d) bahawa D3 menjelaskan untuk semua wang yang dia terima daripada D1 dan D4; dan (e) bahawa defendan membayar plaintif ganti rugi dan juga jumlah wang sebanyak RM1 juta dan RM2.2 juta (jumlah yang dibayar kepada penduduk kampung lain yang bernama Hamzah) kepada amanah. Selepas perbicaraan penuh, Mahkamah Tinggi mendapati bahawa defendan (tidak termasuk D3), termasuk Dinesh, telah melanggar tugas mereka sebagai pemegang amanah/pemegang amanah konstruktif berhubung dengan wang amanah dan memerintahkan mereka membayar sejumlah wang kepada amanah dan benefisiarinya dan juga kepada plaintif 'kerana menyalahgunakan dan salah urus' dana amanah. Mahkamah juga mengisytiharkan bahawa D3 tidak pernah menjadi pemegang amanah dan bahawa HSBC harus menggantikan D1 dan D2 sebagai pemegang amanah tunggal tetapi hanya apabila mahkamah telah membuat arahan untuk melaksanakannya apabila permohonan plaintif dan/atau penerima dan pengurus ('P&P') yang telah dilantik dalam guaman berkaitan untuk menguruskan amanah. Pihak-pihak membuat hujahan berikut pada pendengaran rayuan tersebut.

Rayuan No 220

Plaintif berhujah bahawa 13 perayu yang mendakwa mewakili harta pusaka D2 dan D3 (kedua-duanya mati sebelum perbicaraan bermula di Mahkamah Tinggi) tidak mempunyai locus standi untuk mendakwa rayuan itu kerana mereka tidak pernah menjadi pihak dalam guaman itu. Sehubungan itu, Rayuan No 220 seharusnya dibatalkan. Walaupun plaintif telah memperoleh perintah dari Mahkamah Rayuan untuk menggantikan D2 dan D3 dengan harta pusaka mereka pliding tidak pernah dipinda untuk memformalkan perubahan itu atau tiada salinan perintah penggantian yang disampaikan kepada perayu atau wakil peribadi defendan yang telah mati. Akibatnya, perayu berhujah, harta pusaka D2 dan D3 tidak pernah diwakili di perbicaraan dan oleh itu keputusan mahkamah bicara yang melampirkan liabiliti kepada D2 dan D3 adalah pembatalan untuk pelanggaran peraturan keadilan semulajadi.

Rayuan No 219 dan 221

Plaintif menegaskan bahawa bayaran D4 sebanyak RM2.2 juta (daripada wang pampasan yang diterima) kepada isteri seorang penduduk kampung bernama Hamzah sebagai pertimbangan atas bantuannya mendapatkan pampasan daripada kerajaan negeri dan memperkenalkan D2 dan D3 kepada D1 adalah adalah melampaui batas dan cuai berurusan dengan wang pampasan dan harus dibayar balik kepada amanah. Dinesh berhujah bahawa sejak D4 telah mengeluarkan keseluruhan jumlah sebanyak RM16,554,111.92 pada tahun 2000 sebelum menjadi rakan kongsi firma itu pada tahun 2004, dia tidak boleh dipertanggungjawabkan untuk mengembalikan jumlah itu sama ada kepada

amanah atau kepada plaintif. Dia berkata menurut ss 11 dan 19(1) Akta Perkongsian 1961 dia tidak boleh dipertanggungjawabkan untuk apa-apa firma telah lakukan sebelum dia menjadi rakan kongsi. Perayu berpendapat bahawa penghakiman mahkamah perbicaraan patut dihapuskan kerana hakim bicara telah menyalin/mengambil secara berlebihan penghujahan plaintif tanpa memberikan pertimbangan yang sewajarnya kepada bukti dan penghujahan perayu. Mereka juga berpendapat bahawa hakim bicara bertindak tanpa bidang kuasa dalam memberikan perintah dan pengisytiharan yang tidak dimohon oleh plaintif.

Diputuskan, sebulat suara: (a) membenarkan Rayuan No 220 dan mengetepikan keputusan/perintah Mahkamah Tinggi berhubung dengan D2 dan D3 dan/atau harta pusaka mereka; dan (b) berkenaan dengan Rayuan No 219 dan 221, menolak rayuan terhadap liabiliti tetapi membenarkan, sebahagiannya, rayuan terhadap relif yang diberikan oleh Mahkamah Tinggi dengan memerintahkan bahawa: (i) semua rujukan mengenai liabiliti D2 dan D3 akan dipadamkan; (ii) HSBC menggantikan P&P sebagai pemegang amanah tunggal amanah dalam tempoh dua bulan dan jika HSBC menolak pelantikan itu, responden bebas untuk memohon pelantikan seorang pemegang amanah alternatif; (iii) D1 dan D4 membayar kepada amanah RM2.2 juta dan apa-apa jumlah lain yang mereka didapati bertanggungjawab untuk membayar kepada amanah seperti yang ditentukan oleh HSBC atau pemegang amanah alternatif dilantik oleh mahkamah yang lain selepas kajian terhadap akaun yang diaudit bagi amanah; dan (iv) D1 dan D4 juga membayar plaintif ganti rugi seperti yang dikenalpasti dan disahkan selepas akaun yang telah diaudit telah dikemukakan kepada HSBC atau pemegang amanah alternatif yang dilantik oleh mahkamah:

(1) **Rayuan No 220:** Hakim bicara terkhilaf dalam meneruskan perbicaraan apabila beliau tahu sepenuhnya bahawa rayuan plaintif mengenai permohonan mereka untuk menggantikan harta pusaka D2 dan D3, si mati, sebagai pihak dalam tindakan tersebut belum selesai di hadapan Mahkamah Rayuan ('MR'). Selepas itu, apabila diberitahu bahawa MR telah memberikan perintah penggantian tersebut, hakim bicara tidak memberi sebarang arahan untuk memastikan bahawa wakil D2 dan D3, si mati, berada di mahkamah sehingga masa beliau menyerahkan keputusannya dalam kes terhadap mereka. Keputusan sedemikian yang melanggar undang-undang peraturan semulajadi adalah pembatalan dan keputusan/perintah mahkamah bicara terpaksa diketepikan. Tuntutan plaintif terhadap D2 dan D3 dan/atau harta pusaka mereka, sebenarnya, oleh itu ditolak (lihat perenggan 57–58).

(2) **Rayuan No 220:** Apabila diberi perintah penggantian oleh Mahkamah Rayuan, plaintif sepatutnya, tetapi gagal, untuk menyampaikan perintah penggantian dan writ yang dipinda dan penyataan tuntutan ke atas harta pusaka D2 dan D3. Memandangkan harta pusaka tersebut pada asalnya

bukan pihak guaman tersebut, mereka terpaksa dijadikan pihak-pihak dan disampaikan dengan pliding yang dipinda sebelum mereka dapat mempertahankan tuntutan tersebut. Mahkamah juga menyatakan bahawa tiada bukti bahawa penghakiman mahkamah bicara telah disampaikan sama ada di harta pusaka kedua si mati atau pada 13 perayu. Walaupun dipertikaikan bahawa 13 perayu menyedari sepenuhnya prosiding percubaan, ia tidak melepaskan plaintif dari tanggungjawab mereka untuk menunaikan perintah penggantian dan pliding yang dipinda pada 13 perayu (lihat perenggan 40–44, 48 & 50).

(3) **Rayuan No 219 dan 221:** Walaupun tindakan plaintif tidak berdasarkan penipuan, kausa tindakan itu adalah untuk pecah amanah dan amanah konstruktif mengenai penyalahgunaan, salah urus dan penyelewengan dana amanah. Oleh itu, menurut ss 22(1) (a) dan (2) Akta Had Masa 1953, tindakan itu tidak dihalang oleh tempoh had masa enam tahun di bawah s 6(2). Selain itu, selagi akaun yang diaudit tidak diberikan kepada plaintif atau P&P dan/atau pemegang amanah alternatif yang dilantik oleh mahkamah, ia adalah satu tindakan yang berterusan yang melibatkan akaun yang tersedia wang subjek yang terselamat tempoh had masa enam tahun (lihat perenggan 68).

(4) **Rayuan No 219 dan 221:** Hakim bicara tidak terkhilaf dalam memutuskan bahawa terdapat kewajiban berterusan oleh D4 untuk membayar pampasan plaintif untuk semua kerugian yang timbul akibat penolakan dan/atau kegagalan firma untuk menjelaskan RM16,554,111.92 tersebut. Kegagalan firma untuk menjelaskan jumlah wang yang diterima bagi pihak kliennya dalam akaunnya tidak terhenti untuk wujud oleh masuk atau keluar seorang individu. Seksyen 11 Akta Perkongsian 1961 menyatakan bahawa sesebuah firma, yang bertentangan dengan rakan kongsi individu, wajib membayar apa-apa kerugian atau kecederaan yang disebabkan oleh mana-mana orang yang bertindak semasa perniagaan firma itu. Selagi jumlah wang yang dimiliki oleh dana amanah tidak dibayar balik oleh firma itu, dan selagi akaun yang diaudit tidak diberikan oleh firma kepada plaintif, firma dan rakan kongsinya (termasuk Dinesh) bertanggungjawab atas hutang tersebut dan/atau kewajipan walaupun Dinesh hanya menyertai firma itu pada 2 Januari 2004. Dari tarikh tersebut, Dinesh bertanggungjawab sebagai rakan kongsi untuk apa-apa perbuatan atau peninggalan yang merupakan kewajipan undang-undang firma itu selagi kewajipan tersebut tidak dilepaskan (lihat perenggan 115–117).

(5) **Rayuan No 219 dan 221:** Walaupun hakim bicara mengguna pakai keterangan hujahan plaintif dalam penghakimannya, beliau telah mempertimbangkan semua bukti lisan dan dokumentari yang dikemukakan di hadapan beliau dengan teliti dan kes kedua-dua pihak secara menyeluruh dan terperinci. Beliau benar-benar menghayati fakta,

bukti dan undang-undang dan secara bebas telah membuat analisis sendiri tentang keterangan, tiba di penemuannya sendiri dan kemudian membuat keputusan dan perintah berdasarkan undang-undang. Hakim lebih yakin dengan keterangan yang dikemukakan oleh saksi-saksi plaintif, yang beliau dapati lebih kredibel. Beliau mendapati saksi-saksi defendan, khususnya D1, Hamzah dan Dinesh, berbohong dan tidak mempunyai kredibiliti. Oleh itu, beliau berpendapat bahawa plaintif telah membuktikan kes mereka. Walaupun ianya bukan amalan yang baik untuk seorang hakim untuk menyalin dan/atau mengambil lebih banyak hujahan satu pihak yang, dengan sendirinya, tidak boleh menjadi dasar untuk menyangkal dan membatalkan seluruh penghakiman. Hakim telah menerapkan fikirannya secara objektif terhadap perkara itu di hadapannya dan tiada ketidakfahaman kehakiman atau kekurangan penghargaan terhadap fakta dan undang-undang. Hakim bicara tidak secara jelas salah dan penghakimannya sah dan harus dikekalkan (lihat perenggan 122–123).

(6) **Rayuan No 219 dan 221:** Hakim bicara telah berlepas dari relif yang dipohon oleh plaintif dan telah memberikan relif lain yang menurutnya sesuai. Adalah jelas bahawa plaintif memohon terutamanya untuk akaun yang diaudit untuk dikemukakan oleh defendan dan pembayaran apa-apa jumlah yang perlu dibayar. Ia adalah pramatang bagi hakim untuk memerintahkan sejumlah wang tertentu untuk dibayar oleh defendan kepada plaintif sebelum akaun yang diaudit diperolehi kerana terdapat kemungkinan bahawa jumlah wang yang tidak tepat boleh dibayar tanpa audit yang wajar. Walaupun penemuan hakim bicara mengenai liabiliti adalah betul, beliau sepatutnya tidak memberikan relif pelbagai (lihat perenggan 129, 136 & 138–139).

(7) **Rayuan No 219 dan 221:** Hakim bicara berpendapat bahawa defendan tidak mempunyai autoriti untuk membayar RM2.2 juta dari RM16,554,111.92 kepada Hamzah dan isterinya, Sa'adiah, atas dua sebab: (a) Perintah amanah hanya dibenarkan untuk membayar 'bayaran guaman, kos, yuran perundingan dan perbelanjaan'. Tiada bukti bahawa Hamzah adalah seorang peguam atau seorang perunding yang berhak menerima bayaran tersebut, lebih-lebih lagi apabila tiada invois atau bil yang sah yang menghendaki wang tersebut dibayar; dan (b) defendan tidak pernah mendapat persetujuan 52 orang asli mengenai pembayaran itu. Hakim bicara tidak terkhilaf untuk memutuskan bahawa defendan melanggar duti fidusiari sebagai pemegang amanah/pemegang amanah konstruktif dengan menyalahgunakan, salah urus atau menggelapkan dana amanah dan bahawa mereka bertanggungjawab untuk membayar balik amanah (lihat perenggan 94 & 99).

(8) **Rayuan No 219 dan 221:** Tanpa DG menjadi pemegang amanah sebagaimana yang dikehendaki oleh perintah amanah, pemegang

amanah pertama sepatutnya telah memohon kepada mahkamah untuk mengecualikan DG sebagai pemegang amanah tetapi ini tidak dilakukan. Hakim bicara tidak salah dalam menyimpulkan bahawa pemegang amanah pertama mempunyai tangan bebas atas wang pampasan dan juga melanggar klausa 8.1 dan 8.2 surat ikatan amanah tersebut dengan tidak memberikan laporan akaun yang diaudit dana amanah (lihat perenggan 82–83).]

Notes

For cases on judgments and orders in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5449–5890.

For cases on liabilities of partners in general, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1127–1157.

For cases on parties in general, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6874–7174.

Cases referred to

Alan Michael Rozario v Merbok MDF Sdn Bhd [2010] MLJU 1331; [2011] 1 CLJ 433, HC (refd)

Amat Loyut & Ors v Saling Lau Bee Chiang & Ors [2014] 1 LNS 249, HC (refd)

Ang Game Hong & Anor v Tee Kim Tiam & Ors [2018] 4 MLJ 432, CA (refd)

Asiah bte Abdul Manap & Anor v Capital Insurance Bhd [1998] 4 MLJ 361, FC (folld)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications [2013] 4 MLJ 351; [2013] 4 CLJ 901, FC (refd)

Guthrie Property Development Holding Bhd v Baharuddin bin Hj Ali & Ors [2011] 3 MLJ 416, HC (refd)

Lee Choon Hei v Public Bank Bhd and another appeal [2017] 3 MLJ 441; [2017] 7 CLJ 438, CA (refd)

Leong Sing (sued as a firm) v Perusahaan Kuari (Melaka Pindah) Sdn Bhd (formerly known as Malacca Lian Hwa Sdn Bhd [1997] 5 MLJ 657, HC (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor [1996] 1 MLJ 374, FC (refd)

Noor Mohammed v Hill Produce Trading Co, Badagara & Ors [1980(1)]India Law Report 303 (refd)

Oriental Bank Bhd v Nordin Hamid & Ors [2010] MLJU 1905; [2011] 5 CLJ 237, CA (refd)

Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v Balakrishnan a/l Kaliannan [2013] 6 MLJ 149, FC (refd)

Saling bin Lau Bee Chiang dan lain-lain lwn Kanawagi a/l Seperumaniam dan lain-lain [2012] 10 MLJ 683; [2012] 1 LNS 1330, HC (refd)

Shirley Kathreyn Yap v Malcolm Thwaites [2016] 5 MLJ 602; [2016] 8 CLJ 765, FC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)
Yong Siew Choon v Kerajaan Malaysia [2003] 2 MLJ 150; [2003] 2 CLJ 106, CA (folld)
Zulkiflee bin Abdul Samad v Segi Objektif (M) Sdn Bhd [2016] MLJU 1333, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1), (1)(a), 51(1)(a)
Evidence Act 1950 ss 40, 41, 42, s 43
Legal Profession Act 1976 s 112(1)(b)
Limitation Act 1953 ss 6(2), 22(1), (1)(a), (2)
Partnership Act 1961 ss 11, 12, 19(1)
Penal Code s 409
Rules of the High Court 1980 O 15 rr 6(2)(a), 6(2)(b), 6A, 6A(1), 6A(2), O 20 r 5, O 92 r 94
Rules of Court 2012 O 15, O 15 rr 6A(1), 6A(2), 6A(5A), 7(1), 7(2), 8(1)(a), 8(1)(b), 9, 9(1), O 20, O 20 r 5, 5(1), O 42 rr 1(1), 13

Appeal from: Suit Nos 22–228 of 2009 (MT1) and 23NCVC-106–07 of 2012 (High Court, Johor Bahru)

PM Nagarajan (TA Sivam and Vinoshni Narayanasamy with him) (Nagarajan Peri & Co) in Civil Appeal No J-02(NCVC)(W)-219–02 of 2017 for the appellants.
Ranjan Chandran (Manjeet Singh Dhillon, Shopna Rani Malakar, TA Sivam and Shobah Veera with him) (Hakem Arabi & Assoc) in Civil Appeal No J-02(W)-220–02 of 2017 for the appellants.
Bastion Vendargo (Gene Anand Vendargon and TA Sivam with him) (Bastian Vendargon) in Civil Appeal No J-02(W)-221–02 of 2017 for the appellants.
Gurdial Singh Nijar (Ragumaren Gopal, Abraham Au Tian Hui, Kenneth Koh, Ragunath Kesavan, R Karnan and V Gengeys Vijay with him) (G Ragumaren & Co) (Rosley Zachariah) in Civil Appeal Nos J-02(NCVC)(W)-219–02 of 2017, J-02(W)-220–02 of 2017 and J-02(W)-221–02 of 2017 for the respondents.

Yeoh Wee Siam JCA (delivering judgment of the court):

INTRODUCTION

[1] This judgment is in respect of the following three appeals heard before us on 28 February 2018, 9–12 July 2018, 13 August 2018, 15 August 2018 and

16 August 2018 arising from Johor Bahru High Court Civil Suit No 22–228 of 2009 ('Suit 228'):

(a) Appeal No J-02(W)-219–02 of 2017 filed by Tetuan Khana & Co ('fourth defendant') ('Appeal 219');

(b) Appeal No J-02(W)-220–02 of 2017 filed by Ramlan bin Adong & Ors ('Appeal 220'); and

(c) Appeal No J-02(W)-221–02 of 2012 filed by Dinesh Kanavaji a/l Kanawagi ('Dinesh') ('Appeal 221').

[2] In this judgment, the parties are referred to as they were in the High Court. However, wherever the context requires, any of the defendants and/or Dinesh would be referred to as 'the appellant' or 'the appellants'.

BACKGROUND FACTS

The land acquisition

[3] Sometime in the early 1990s, the Johor State Government acquired 53,000 hectares of land in the Linggui Valley, Kota Tinggi District, Johor for the purposes of construction of a dam pursuant to an agreement with the Government of Singapore ('the land'). The acquisition of the land affected mainly three *orang asli* villages, namely:

(a) Kampung Sayong Pinang;

(b) Kampung Semanggar; and

(c) Kampung Pasir lntan.

[4] As a consequence of the acquisition, the *orang asli* from the three villages were deprived of the use of their ancestral land and traditional sources of income. In or about 1994, the *orang asli* living in the said villages decided to sue the Johore State Government for compensation. For that purpose, 52 of the *orang asli* from the three villages appointed the first defendant in Suit 228, Kanawagi a/l Seperumaniam ('Kanawagi'), of Tetuan Khana & Co ie the fourth defendant in Suit 228 ('Khana & Co' or 'the firm'), to represent them.

[5] A person by the name of Hamzah Mohd Tahir ('Hamzah') led the negotiations on behalf of the *orang asli* with the Johor State Government. However, the negotiations failed. Hamzah then introduced the following three village headmen to the first defendant:

(a) Adong bin Kuwau, who was the Tok Batin of Kampung Sayong Pinang, the second defendant in Suit 228 ('Tok Batin Adong');

(b) Daud bin Kadir, who was the Tok Batin for Kampung Semanggar, the third defendant in Suit 228 ('Tok Batin Daud'); and

(c) Abdul Rahman bin Abdullah of Kampung Pasir lntan ('Abdul Rahman'). However, he was not a Tok Batin.

(Tok Batin Adong and Tok Batin Daud are hereinafter also referred to as 'the two Tok Batins').

[6] The first defendant, through his law firm, Khana & Co, acted for the 52 *orang asli* in their claim for compensation against the Johor State Government in Johor Bahru High Court Originating Summons Suit No 24–828 of 1994 ('OS 828').

[7] In OS 828, the plaintiffs, ie the 52 *orang asli*, sought the following declarations:

(a) a declaration that all the lands acquired by the defendants for the purpose of constructing the Sungai Linggiu Dam near Kota Tinggi, Johor is aboriginal area or aboriginal reserve; and

(b) a declaration that the defendants jointly or severally pay to the plaintiffs all the compensation received by them from the Government of the Republic of Singapore or a sum deemed just by the court.

[8] The 52 *orang asli* obtained judgment in OS 828 on 19 December 1995 for the sum of RM26.5m as compensation to be paid to the *orang asli* ('the compensation order').

[9] The appeal of the Johor State Government against the High Court decision in OS 828 was dismissed with costs by the Court of Appeal on 19 November 1997. The matter was remitted to the Johor Bahru High Court to decide in OS 828 on the terms and mechanics of the payment of compensation to the 52 *orang asli*. Khana & Co filed an application for an order for the management of the compensation sum awarded to the *orang asli*.

[10] Consequently, in respect of OS 828, the Johor Bahru High Court made an order on 5 June 2000 as follows:

(a) the Johor State Government to pay the compensation together with interest accrued amounting to RM38,554,111.92 ('the judgment sum');

(b) the sum of RM22m from the judgment sum to be paid into a trust account and a trust be established under the name of the Linggiu Valley Orang Asli (Jakuns) Trust ('the trust');

(c) the trust must be established in accordance with the deed of trust ('the trust deed') as ordered by the court;

(d) Tok Batin Adong, Abdul Rahman and Kanawagi be appointed as the first trustees ('the first trustees'), and who shall execute the trust deed;

(e) the Director General ('DG') of Jabatan Hal Ehwal Orang Asli, Malaysia ('JHEOA'), for the time being shall be appointed the additional trustee of the trust;

(f) the balance of the compensation sum (amounting to RM16,554,111.92) was to be handed to Kanawagi who shall distribute the said sum to the 52 orang asli after the deduction and payment of legal fees, costs, consultation fees and expenses incurred; and

(g) the trustees have liberty to apply in relation to be implementation of the trust and the performance of their duties under the trust.

('the trust order').

[11] By the trust order, a trust deed dated 5 June 2000 was created governing the terms relating to the RM22m. On 5 July 2000, the Johor State Government paid the RM22m directly to the trustees. On 13 July 2000 the Johor State Government paid the balance sum of RM16,554,111.92 directly to Khana & Co.

The trust deed

[12] The salient terms of the trust as embodied in the trust deed are:

(a) the RM22m would be kept in trust for the 52 orang asli and their descendants, but no child descendant shall be entitled to any share or distribution of the assets or income during the lifetime of his or her parent (cl 2 of the trust deed); and

(b) the trustees shall be:

(i) Tok Batin Adong, and Abdul Rahman, ie the headmen of the villages;

(ii) the DG of JHEOA;

(iii) one independent person;

(iv) the first trustees (cl 3.1 of the trust deed);

(v) RM900 per month to be paid to the beneficiaries of the trust from the RM22m; and

(vi) the trustees to maintain proper accounts (cl 8 of the trust deed).

The disbursement of the compensation sum

[13] On or about 5 July 2000, the Johor State Government paid the compensation sum of RM22m directly to Khana & Co. On 13 July 2000, the Johor State Government paid a further sum of RM16,554,111.92 to Khana & Co in accordance with the terms of the trust order. According to the defendants, pursuant to the High Court order dated 5 June 2000, the following payments, inter alia, were made:

(a) RM2.2m was paid to Hamzah;

(b) RM1.9m and RM3m were paid to Messrs R Rajasingam & Co;

(c) RM500,000 was paid to Messrs RR Sethu; and

(d) the sum of RM500,000 and RM4,054,222.93 were paid to Khana & Co as lump sum legal fees.

[14] The trustees then placed the compensation sum of RM22m in a fixed deposit, and through the two Tok Batins and Abdul Rahman paid the RM900 per month including any monthly interest balance to the beneficiaries (ie to each of the 52 plaintiffs) as stipulated under cl 5 of the trust deed from October 2000–March 2009.

[15] By a court order dated 4 April 2006 (Johor Bahru High Court Civil Suit No 24–197 of 2006), Kanawagi and Khana & Co were ordered to provide a financial statement of the trust certified by a qualified public accountant. However, through their solicitors, Messrs Sharifah & Associates, the defendants instead submitted unaudited/uncertified financial statements for the years 2000–2006 which in essence was in violation of the said court order. Thus, the plaintiffs contended that by doing so the defendants are in breach of cl 8.1 of the trust deed which stipulates:

> In each financial year the trustees shall have prepared by a certified public accountant authorized to practise in Malaysia financial statements, including a profit and loss account and balance sheet as at and of each financial year certified by such accountant to be true and proper statement of the affairs of the trust setting out all:
>
> (a) income of the trust fund;
>
> (b) capital of the trust fund;
>
> (c) costs and disbursements and other outgoings paid or payable out of the trust fund and chargeable against income;
>
> (d) capital expenditure and liabilities chargeable to capital;
>
> (e) investment and money comprised in the trust fund;
>
> (f) amounts distributed by the Trustees to each beneficiary;

(g) to the extent to which the Trustees may require, the separate recording of any category of income capital.

[16] The plaintiffs, who are beneficiaries to the trust, sued the defendants in Suit 228 for the following:

(a) as against the defendants, for breach of trust;

(b) as against Kanawagi, and Khana & Co, for breach of constructive trust relating to the balance sum of RM16,554,111.92; and

(c) as against the two Tok Batins, for knowing receipt of trust funds. We note that Abdul Rahman was not made a defendant in Suit 228.

[17] On 1 August 2008 the trustees withdrew RM7m out of the RM22m and purchased 27 units of condominium as investment. On 5 September 2004 a police report was made by the first plaintiff, Saling bin Lau Bee Chiang, against the trustees for impropriety in the management of the trust. Kanawagi and his son, Dinesh, were charged for criminal breach of trust under the Penal Code, and for money laundering under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA'). Kanawagi and Dinesh were acquitted and discharged without their defence being called. On appeal, the High Court upheld and affirmed the decision of the sessions court.

The appointment of the receiver and manager

[18] On 25 March 2009, the High Court of Johor Bahru appointed an interim receiver and manager ('the R&M') to manage the trust. After the appointment of the R&M, the R&M filed a suit in the Kuala Lumpur High Court relating to the same subject matter, namely MTKL-22NCC-1512–09 of 2011 ('KL Suit'). The first to seventh defendants filed an application to transfer the KL Suit to the Johor Bahru High Court, and for it to be consolidated with the first suit, ie Suit 228. The Kuala Lumpur High Court dismissed the application. On appeal, the Court of Appeal allowed the appeal and ordered the KL Suit to be transferred to the Johor Bahru High Court and for it to be consolidated with Suit 228. The KL Suit was registered as Johor Bahru High Court Civil Suit No 23NCVC-106–07 of 2012 ('Suit 106').

Injunctions and the AMLA seizure

[19] Sometime in 2009, 78 beneficiaries vide Suit 228 applied ex parte for an injunction which was granted by High Court on 17 April 2009. The defendants were restrained from disposing, dissipating and/or diminishing the assets of the trust. On a second application, the High Court on 5 May 2009 granted an ad interim order appointing a R&M to receive and manage all the

assets of the trust. The defendants were ordered to deliver all the assets of the trust to the R&M, in particular, the 27 condominium units.

[20] The defendants applied to set aside the injunctions. However, the applications were dismissed by the High Court on 11 September 2009. The defendants' appeal to the Court of Appeal was dismissed, which means both the injunctions still remain in force.

[21] On 6 August 2012 the public prosecutor seized the 27 condominium units pursuant to s 51(1)(a) of the AMLA as they were purported to be the subject matter of an offence under s 4(1) of the AMLA. The notice of seizure dated 6 August 2012 notified in clear terms that Kanawagi was prohibited from dealing with the property in any manner whatsoever.

THE PLAINTIFFS' CLAIM IN SUIT 228

[22] In Suit 228, the plaintiffs claimed that Kanawagi and Tok Batin Adong, as trustees of the trust, owed fiduciary duties to the plaintiffs as beneficiaries of the trust, whilst Khana & Co, were constructive trustees of the amounts received and held by them in respect of the trust. It is the plaintiffs' pleaded case that the defendants committed various breaches of the trust and/or assisted in those breaches of the trust to the detriment of the plaintiffs

[23] In the same suit, the plaintiffs contended that the defendants failed, refused and/or neglected to provide and render any information and accounting whatsoever in respect of the trust and the trust funds.

[24] The plaintiffs appointed Folks Corporate Services Sdn Bhd ('Folks') to audit the unaudited financial statement. Folks prepared a report dated 17 January 2008 and made certain findings which formed the basis for the plaintiffs' claim in Suit 228:

(a) the trust deed has been breached for failing to include the DG of JHEOA as a trustee;

(b) there are less than four trustees which is not in accordance with the terms of the trust deed;

(c) between the years 2000–2006, the sum of RM5,511,457 was paid to the beneficiaries. However, a sum of less than RM2,778,300 was instead received by the beneficiaries and there was no accounting for this discrepancy;

(d) no details of legal fees, costs, consultant fees and expenses with regard to the payment of RM16,554, 111.92 as legal fees;

(e) the sum of RM2,716,920 was not accounted for. This is a sum

purportedly paid to the three village headman, ie the two Tok Batins and Abdul Rahman, for the purpose of distribution to the beneficiaries, but the plaintiffs, as beneficiaries, were not aware of it, nor had they received this sum; and

(f) no tax has been paid on the revenue.

The plaintiffs' prayers for reliefs

[25] In para 83.3F of the plaintiffs' amended statement of claim dated 8 February 2012 (which was applicable at the time of commencement of the trial) for Suit 228, the plaintiffs prayed for the following reliefs:

83.3F Removal and appointment of trustees

(a) For an order that the 1st and 2nd Defendants [or any other trustees that may have been appointed since] be removed as the trustees to the Linggiu Valley Orang Asli (Jakun) Trust forthwith and that HSBC (Malaysia) Trustee Berhad ('HSBC Trustees') be appointed as sole trustees in place of the 1st and 2nd Defendants (or any other trustees that may have been appointed since) for the Linggiu Valley Orang Asli (Jakun) Trust forthwith;

(b) That the terms of the trust deed be varied pursuant to Clause 10 to replace the trustees for the Linggiu Valley Orang Asli (Jakun) Trust as prayed for in (a);

(c) That the Linggiu Valley Orang Asli (Jakun) Trust funds be transferred to and/or administered by HSBC Trustees in place of the 1st and 2nd Defendants (or any other trustees that may have been appointed since);

(d) That all necessary vesting and other orders in favour of HSBC Trustees in respect of the Linggiu Valley Orang Asli (Jakun) Trust may be made;

(e) In so far is necessary, the administration of the Linggiu Valley Orang Asli (Jakun) Trust be undertaken by this Honourable Court;

(f) That HSBC Trustees be at liberty to apply to the Court in respect of any matters concerning the administration of the Trust.

Injunctive relief

(g) That the 1st and 2nd Defendants and/or any persons appointed by the 1st and 2nd Defendants and/or any servants/agents of the 1st and 2nd Defendants be restrained from holding themselves out as trustees for the Linggiu Valley Orang Asli (Jakun) Trust;

(h) An order that the 1st and 2nd Defendants hand over the operation of all monies and assets in the Linggiu Valley Orang Asli (Jakun) Trust together with all relevant and required documents, bank statements etc to HSBC Trustees forthwith and sign all documents as may be necessary to allow HSBC Trustees to manage the Linggiu Valley Orang Asli (Jakun) Trust;

(i) In the event the 1st and 2nd Defendants do not perform as ordered in prayer (h) above, that the Registrar of the Court do execute all relevant documents necessary

to effect and complete the transfer of trusteeship of the Linggiu Valley Orang Asli (Jakun) Trust to HSBC Trustees;

(j) An order that the 1st and 2nd Defendants be compelled within forty-eight (48) hours from date of the order to inform the Plaintiffs' Solicitors and/or this Court by way of an affidavit to be filed in Court and served on the Plaintiffs' solicitors, as to the exact details of where the Trust Funds were kept/maintained from its receipt to current date whether within or outside the jurisdiction of Malaysia ie name of the body or financial institution, the dates of placement/deposit and withdrawal of the Trust Funds from such body or institution, its address, account number, amounts placed therein and any other information as may be required from time to time by the Plaintiffs and/or HSBC Trustees.

(k) An order that the 1st and 2nd Defendants, jointly or in their several capacity, be restrained forthwith from dealing in any manner whatsoever with the Trust monies in whichever account or place or any bank or financial institution that have been maintained by the 1st and 2nd Defendants, jointly or in their several capacity, within or outside the jurisdiction of Malaysia.

Appointment of new trustees on terms

(l) An order that HSBC Trustees be appointed on the following terms and conditions:

(i) that HSBC Trustees shall ensure that the trust assets are in the name of the Trust;

(ii) that HSBC Trustees shall provide to the Plaintiffs and to this Court a monthly portfolio valuation report which will provide detail as to the asset Trust Funds allocation and the transactions carried out during the period;

(iii) that HSBC Trustees shall be entitled to invest the trust assets to ensure capital appreciation;

(iv) that HSBC Trustees shall be entitled to perform the necessary corporate action(s) for the investment of the Trust Funds equities;

(v) that HSBC Trustees shall distribute a monthly income of not less than RM900.00 to the Plaintiffs' respective accounts as stipulated in the trust deed;

(vi) that HSBC Trustees shall prepare annual audited accounts with respect to the Trust Funds;

(vii) that HSBC Trustees shall prepare annual tax returns for submission to Inland Revenue;

(viii) that HSBC Trustees agrees to fix their fee at 0.5% of the gross asset value of the fund subject to a minimum fee of RM30,000.00 per annum and a maximum fee of RM100,000.00 per annum;

(ix) that HSBC Trustees shall do all things to comply fully with the terms of the trust deed and for the full benefit of the Plaintiffs and the other beneficiaries of the Linggiu Valley Orang Asli (Jakun) Trust.

As regards the RM16,554,111.92 forming part of the Actual Compensation

(m) An audited statement of accounts with respect to the RM16,554, 111.92, be ordered to be given by the 1st and 4th Defendants to the new trustees i.e. HSBC Trustees together with copies of all certified and relevant and supporting documents evidencing the same, within fourteen (14) days from date of the order.

(n) That the new trustees i.e. HSBC Trustees' appointed auditor will be entitled to conduct an independent audit on receipt by the new trustees i.e. HSBC Trustees of the said accounts and documents rendered by the 1st and 4th Defendants and thereafter render such audit report to the Plaintiffs and/or their solicitors and to the Court as soon as may be possible;

(o) that the 1st and 4th Defendants do be ordered to pay the sum found to be due on the taking of the said accounts forthwith and that such payment be made to the new trustees i.e HSBC Trustees and to be placed in the Linggiu Valley Orang Asli (Jakun) Trust managed by them for the full benefit of the Plaintiffs;

(p) An Order that the payment of such sums due as stated in prayer (o) be paid by the 1st and 2nd Defendants to the new trustees together with interest accrued thereon at the rate of 8% per annum from the date the sums were due to date of realisation.

As regards the RM22,000.000.00 forming part of the Actual Compensation

(q) An audited statement of accounts (such statement certified by the person primarily responsible for the financial management of the 1st and 2nd Defendants) with respect to the RM22,000.000.00, be ordered to be given by the 1st and 2nd Defendants to be new trustees i.e HSBC Trustees together with copies of all certified and relevant and supporting documents evidencing the same within thirty (30) days from date of the order.

(r) That the new trustees i.e. HSBC Trustees appointed auditor ie Folks Corporate Services Sdn Bhd do be entitled to conduct an independent audit on receipt by the new trustees i.e. HSBC Trustees of the said accounts and documents rendered by the 1st and 2nd Defendants under (q) above, to verify the same and be allowed access to all the relevant and supporting documents in the Defendant's office [or at any place where such documents are maintained], and thereafter render such audit report to the Plaintiff, the Defendants and to the Court as soon as may be possible;

(s) That the 1st and 2nd Defendants do be ordered to pay the sum found to be due on the taking of the said accounts forthwith and that such payment be made to the new trustees i.e HSBC Trustees and to be placed in the Linggiu Valley Orang Asli (Jakun) Trust managed by them for the full benefit of the Plaintiffs;

(t) An Order that the payment of such sums due as stated in prayer (s) be paid together with interest accrued thereon at the rate of 8% per annum from the date such sums became due to date of realisation.

As regards the sums received by the third defendant

(u) That the third defendant to provide an account of all monies paid out to him by the 1st and/or 4th Defendants by way of an affidavit affirmed and served on the Plaintiffs' solicitors within 2 days of this order.

Special Damages

(v) That judgment be given for RM1,000.000.00 and the Defendants be ordered to pay the sum of RM1,000,000.00 to HSBC Trustees and to be placed in the Linggiu Valley Orang Asli (Jakun) Trust managed by them for the full benefit of the Plaintiffs;

(w) That judgment be given for RM2,200,000.00 and that the Defendants be ordered to pay the sum of RM2,200,000.00 to HSBC Trustees and to be placed in the Linggiu Valley Orang Asli (Jakun) Trust managed by them for the full benefit of the Plaintiffs.

Damages

(x) Damages to be ordered to be paid by the 1st to 4th Defendants to the Plaintiffs;

Costs

(y) That the Defendants be ordered to pay costs to the Plaintiffs on an indemnity basis.

Further or other relief

(z) Such further and/or other relief deemed fit and appropriate by this Honourable court to so grant.

DECISION OF THE HIGH COURT

[26] On 22 December 2016, The High Court delivered its decision in respect of Suit 228. The plaintiffs' claim for reliefs and remedies from the defendants, including Dinesh, jointly or severally was allowed as follows:

(a) declaration:

(i) it is declared that the defendants, including Dinesh Kanavaji, have failed to give a proper account of the affairs of the trust to the plaintiffs;

(ii) it is declared that the third defendant was never a trustee;

(iii) it is declared that the first, second and fourth defendants, including Dinesh Kanavaji, have failed to discharge their duties as trustees/constructive trustees properly;

(iv) it is declared that the defendants, including Dinesh Kanavaji, have misused, mismanaged and misappropriated trust funds for their own personal gain;

(v) it is declared that the first and second defendants are liable to the plaintiffs for breach of trust;

(vi) it is declared that the fourth defendant, including Dinesh Kanavaji,

have breached their duty as constructive trustees towards the plaintiffs;

(vii) that the first and second defendants are hereby removed as trustees of the trust;

(viii) it is declared that the defendants, including Dinesh Kanavaji, have breached their duties as trustees/constructive trustees when they withdrew RM7m from the trust fund;

(ix) an order that the R&M continues to discharge his obligations according to any order which might be made in this suit and/or in the Civil Suit No 23NcVC-106–07 of 2012 by this court, until the application of the R&M and/or the plaintiff that the R&M be discharged and released;

(x) cl 3 of the trust deed is varied to state that the sole trustee of the trust shall be HSBC (M) Trustee Bhd, but only from such time as directed by this court upon the application of the R&M and/or the plaintiffs; and

(xi) that cl 9 of the trust deed is varied to state that the remuneration of the trustee shall be at the rate in accordance with the standard rate as stated in the terms of appointment of HSBC (M) Trustee Bhd;

(b) damages:

(i) the defendants including Dinesh Kanavaji pay the sum of RM16,054,111.92 to the beneficiaries of the trust;

(ii) the defendants including Dinesh Kanavaji pay the sum of RM2,716,920 to the trust;

(iii) the defendants including Dinesh Kanavaji pay the sum of RM1,057,340.33 to of the trust;

(iv) the defendants including Dinesh Kanavaji pay the sum of RM865,072.04 to the trust;

(v) the defendants including Dinesh Kanavaji pay the sum of RM27,863.31 to the trust;

(vi) the defendants including Dinesh Kanavaji pay the sum of RM40,000 to the trust; and

(vii) the defendants including Dinesh Kanavaji pay the sum of RM5m to the plaintiffs based on their conduct in abusing and mismanaging the trust funds involving millions of Ringgit;

(c) cost:

Cost of RM500,000 payable by the defendants including Dinesh Kanavaji to the plaintiffs.

CONSIDERATION OF THE THREE APPEALS BY THIS COURT

Appeal 220

The demise of the two Tok Batins before the trial

[27] This is the appeal by the alleged 13 representatives ('the 13 appellants') of the estate of the two Tok Batins, namely the second and third defendants, against the whole of the decision of the High Court dated 22 December 2016.

[28] Suit 228 was filed in 2009. The full trial of Suit 228 commenced on 1 October 2012 and ended on 23 May 2016. Tok Batin Adong, the second defendant, passed away on 11 July 2010, ie more than two years before the trial commenced. Tok Batin Daud, the third defendant, passed away on 14 November 2010, almost two years before the trial commenced.

[29] Learned counsel for the plaintiffs submitted that the 13 appellants were not parties in the court below. Therefore, they have no locus standi to appear before this court. On this point alone, Appeal 220 ought to be struck out.

[30] It is an undisputed fact that the plaintiffs had, by way of a summons in chambers ('encl 468'), applied to substitute the second and third defendants with their estates. The application, as stated in the first paragraph of encl 468, was made pursuant to O 15 r 6(2)(a), (2)(b), O 15 r 6A(1), (2), O 20 r 5 and O 92 r 94 of the applicable rules then, ie the Rules of the High Court 1980 ('the RHC').

[31] Gunalan Muniandy JC (as he then was) heard encl 468 and gave his decision dated 28 December 2012 (see *Saling bin Lau Bee Chiang dan lain-lain lwn Kanawagi a/l Seperumaniam dan lain-lain* [2012] 10 MLJ 683; [2012] 1 LNS 1330). He dismissed the application for substitution. We note from his decision that there was no legal representation of the two deceased Tok Batins, ie the second and third defendants, during the hearing of encl 468.

[32] On appeal, the Court of Appeal on 3 April 2013 allowed the appeal of the plaintiffs therein and granted the order for substitution of the two deceased Tok Batins ('substitution order'). Again, there was no legal representation of the two deceased Tok Batins in the Court of Appeal.

[33] The 13 appellants submitted that they are the lineal descendants of the two deceased Tok Batins. They contended that they were not at the trial of

A Suit 228, and yet the High Court allowed the plaintiffs' claim against the two Tok Batins and made various orders, inter alia, against the estate of the two deceased Tok Batins. Being aggrieved by such orders, the 13 appellants therefore filed this appeal.

B **[34]** The plaintiffs were unable to produce any proof of service on the representatives of the estate of the two deceased Tok Batins, or on the 13 appellants of the substitution order granted by the Court of Appeal.

C **[35]** Learned counsel for the plaintiffs submitted that further to the substitution order, the plaintiffs were not required to take any further action. In the alternative, the omission by the plaintiffs in filing the amended writ and statement of claim naming the 13 appellants herein was merely a procedural irregularity, and the High Court trial had proceeded properly and regularly, as
D if the amended writ and statement of claim were in fact filed.

[36] The plaintiffs further submitted that the learned High Court judge ('judge') took cognisance of the substitution order of the Court of Appeal dated 3 April 2013 and at p 14 of his judgment had stated that all references to the
E liability of the second and third defendants are to be imputed onto their estates.

[37] The RHC have been revoked and replaced by the Rules of Court 2012 ('the ROC') which come into operation on 1 August 2012. Orders 15 and 20 of the ROC are similar to the ones in the RHC. Both parties submitted before
F us on the applicability of, inter alia, O 15 r 6A(1), (2), (5A), O 15 r 7(1), (2), O 15 r 8(1)(a), (1)(b), O 15 r 9(1) and O 20 r 5 of the ROC. We now set out the relevant provisions of O 15 and O 20 of the ROC:

O 15:

G

6A Proceedings against estates (O 15 r 6A)

(1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the
H deceased.

(2) Without prejudice to the generality of paragraph (1), an action brought against 'the personal representatives of A. B. deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.

I (5A) Where an order is made under paragraph (4) appointing the Official Administrator to represent the estate of the deceased, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making such an order or on a subsequent application, the Court, with the consent of the Official Administrator, directs that the appointment shall extend to taking further steps in the proceedings.

7 Change of parties by reason of death (O 15 r 7)

(1) Where a party to an action dies or becomes bankrupt but the case of action survives, the action shall not abate by reason of the death or bankruptcy.

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first- mentioned party. An application for an order under this paragraph may be made ex parte.

8 Provisions consequential on making order under rule 6 or 7 (O 15 r 8)

(1) Where an order is made under rule 6, the writ by which the action in question was begun shall be amended accordingly and shall be endorsed with —

(a) a reference to the order in pursuance of which the amendment is made; and

(b) the date on which the amendment is made, and the amendment shall be made within such period as may be specified in the order or, if no period is so specified, within fourteen days after the making of the order.

(2) Where by an order under rule 6 a person is to be made a defendant, the rules as to the service of a writ of summons shall apply accordingly to the service of the amended writ on him.

9 Failure to proceed after death of party (O 15 r 9)

(1) If after the death of a plaintiff or defendant in any action the cause of action survives, but no order under rule 7 is made substituting as plaintiff any person in whom the cause of action vests or, as the case may be, the personal representatives of the deceased defendant, the defendant or, as the case may be, those representatives may apply to the Court for an order that, unless the action is proceeded with within such time as may be specified in the order, the action shall be struck out as against the plaintiff or defendant, as the case may be, who has died; but where it is the plaintiff who has died, the Court shall not make an order under this rule unless the Court is satisfied that due notice of the application has been given to the personal representatives, if any, of the deceased plaintiff and to any other interested persons who, in the opinion of the Court, shall be notified.

O 20:

5(1) Amendment of writ or pleading with leave (O 20, r 5)

Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to cost or otherwise

as may be just and in such a manner, if any, as it may direct.

[38] From a perusal of the first paragraph of encl 468 itself, and the applicable provisions of the RHC, we are of the view that encl 468 was made under O 15 r 6A of the RHC, and not under O 15 r 7(1) and (2) of the RHC (as contended by the 13 appellants). Thus, the cause of action against the two Tok Batins survived after the death of the two Tok Batins, and the action or Suit 228 may be brought against their estate.

[39] However, we do not agree with learned counsel for the plaintiffs that, after having obtained the substitution order, there are no more steps to be taken. In *Asiah bte Abdul Manap & Anor v Capital Insurance Bhd* [1998] 4 MLJ 361, the Federal Court at p 372 stated that after the death of a party, there is a necessity to substitute the parties so as to be able to carry on with the suit:

> We note that this court granted leave to appeal on the specific question as to whether the order of the Court of Appeal dated 25 July 1995 should be set aside since it was made after the deceased Kasim had died and no order of substitution or to carry on the proceedings under r 41 of the Rules of the Court of Appeal1994 had been given. The said rule 41 provides for reconstitution of an appeal in the event of certain changes affecting a party eg death or affecting the interest or liability of a party. Where an appellant (or a respondent) dies, the appeal does not, by that reason alone, become abate (r 40). The proper thing to do at that stage would be for the personal representative, if any, or any person interested to apply under r 41 for a substitution order or an order to carry on the proceedings.

In *Yong Siew Choon v Kerajaan Malaysia* [2003] 2 MLJ 150 at pp 157–158; [2003] 2 CLJ 106 at pp 113–114, the Court of Appeal stated:

> In the present case, the action was commenced in accordance with the permissive provision in O 15 r 6A(1). But it was prosecuted in defiance of the mandatory provisions of O 15 r 6A(4) which is the only provision that enables an action to be kept on foot. So, non-compliance of O 15 r 6A(4) is not a mere irregularity, it runs counter to a point of substantive law, namely, that an action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. It follows that the respondent's suit in the present instance is an illegality and therefore a nullity.
>
> To summarise, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation have been extracted. Order 15 r 6A provides a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in r 6A(4)) certain steps to be taken in that respect and specifying the time limited for the taking of such steps. Failure to observe the terms of r 6A(4) of O 15 will therefore deprive a

plaintiff of the beneficial effect of r 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity. A

[40] Applying the principles in the above authorities to the present case, after being granted the substitution order by the Court of Appeal, the plaintiffs are required to serve such order on the estate of the two deceased Tok Batins, which they failed to do. B

[41] In addition, the plaintiffs are also required to amend the writ of summons ('writ') and the statement of claim, in particular the intitulement, file it in court, and at the same time serve it on the estate of the two deceased Tok Batins. Again, this was not done. C

[42] We do not agree with the submissions of learned counsel for the plaintiffs that, pursuant to O 20 r 5(1) of the ROC, there is no requirement for service of the amended writ and statement of claim dated 3 April 2013 on the estate of the two deceased Tok Batins since the amendments made were in the course of proceedings. This is for the reason that the estate of the two deceased Tok Batins was originally not a party to Suit 228. They were not existing parties, but are now to be made new parties to the suit. Therefore, they have to be served with such amended pleadings before they can defend the claim. D E

[43] In this respect, we cite O 42 r 1(1) and O 42 r 13 of the ROC which require every judgment and order of the court to be given or served on parties, as the case may be: F

1 Delivering judgment (O 42, r 1)

(1) Every judgment, after the hearing of a cause or matter in open Court, shall, subject to paragraphs (3) and (4), be pronounced in open Court either on the conclusion of the hearing or on a subsequent day of which notice shall be given to the parties. G

13 Setting aside or varying judgment and orders (O 42, r 13)

Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order of judgment by him. H

I

[44] We further note that there is no proof of service of the judgment of the High Court in Suit 228 on the estate of the two Tok Batins, or even on the 13 appellants.

Non-representation of the estate of the second and third defendants, ie the two Tok Batins, during the trial

[45] In the order dated 22 December 2016 issued pursuant to the judgment of Samsudin bin Hassan J given after the trial of Suit 228, it is stated that the first, second and third defendants were represented by Shopna Rani Malabar ('Shopna Rani'). However, Shopna Rani submitted there is an error in the order. She only represented the first defendant, but not the second and third defendants. This was evidenced by the notice of change of solicitors dated 4 January 2013 and the notes of proceedings in the High Court dated 22 December 2016.

[46] From the documents produced by learned counsel for the plaintiffs (see 'Chronology of Representation in the JBHC Suit MTI-220–228 of 2009 Suit' ('chronology')), and by Shopna Rani, this court notes the following:

(a) the letter dated 4 May 2009 from Messrs Khana & Co to Messrs G Ragumaren & Co states that Messrs Khana & Co act for the defendants. This means that they were also acting for the second and third defendants (Tab 1 of chronology);

(b) from the notice of change of solicitors dated 25 May 2009, Messrs Sharifah & Associates took over from Messrs Khana & Co (Tab 2 of chronology). This means that they ceased to act for the second and third defendants from 17 October 2011;

(c) Tok Batin Adong (second defendant) passed away on 11 July 2010, and Tok Batin Daud (third defendant) passed away on 14 November 2010. In the Johor Bahru High Court Order dated 17 October 2011, Messrs Sharifah & Associates were disqualified from representing the defendants (Tab 3 of chronology);

(d) pursuant to the notice of change of solicitors dated 31 October 2011 (Tab 4 of chronology), Messrs Mohamed lsa & Associates acted as solicitors for the first defendant. However, there was no mention that they acted for the second and third defendants;

(e) after 17 October 2011, there appears to be no solicitors on record for the second and third defendants; and

(f) Messrs G Ragumaren & Co, by a letter dated 24 October 2017 to Messrs Shopna Rani Malakar & Co, enclosed the judgment dated 22 December 2016 'by way of service on you as solicitors for the first, second and third defendants' (Tab 19 of chronology).

[47] We do not think that the letter in para 46(6) above proves that Messrs Shopna Rani Malakar & Co are the solicitors for the second and third

defendants. There was no notice of change of solicitors filed to that effect. Based on the documents tendered, we accept Shopna Rani's submission that there is an error in the order dated 22 December 2016. Therefore, as noted in the notes of proceedings dated 22 December 2016, the second and third defendants, and also their estate, were absent in court, and were not represented by counsel at the trial.

[48] Learned counsel for the plaintiffs submitted that at all material times, the 13 appellants were fully aware of the proceedings. He brought to the attention of this court the Johor Bahru High Court Civil Suit No 23NCVC-143–10 of 2012, *Amat Loyut & Ors v Saling Lau Bee Chiang & Ors* [2014] 1 LNS 249 ('Suit 143') where the 13 appellants were also plaintiffs out of the 163 plaintiffs in Suit 143. In that suit, the 13 appellants sued the plaintiffs in the present case as defendants, including the first defendant herein for acting, via his legal firm ie the fourth defendant herein, for gross abuse of the court process.

[49] The following statements of Abdul Rahman Sebli J (as he then was) in his judgment in Suit 143, regarding the application by Messrs Sharizal & Nasir to discharge themselves from acting as solicitors for the 163 plaintiffs, are noted:

> At p 7:
>
> Essentially the plaintiffs' claim in the present suit is to remove the first defendant as Receiver & Manager of the Linggiu Valley Orang Asli (Jakun) Trust who had earlier been appointed by the court in Suit No 22–228 of 2009 ('the 228 Suit) by an ex parte order dated 17 April 2009 and confinmed by an inter-parte order dated 11 September 2009. The 228 Suit is still 'alive' and ongoing before another Johor Bahru High Court. The core subject matters in the present suit are the same as those in the 228 Suit and the reliefs sought by the plaintiffs had already been sought (and refused) in the 228 Suit clearly therefore the filing of the present suit was an abuse of process. If the plaintiffs wanted to seek a revocation of the appointment of the first defendant as receiver & manager, they should have applied to do so under the 228 Suit and not by filing a separate and overlapping suit seeking the same relief;
>
> At pp 13 and 14:
>
> I should perhaps first deal with the motive for Mr Subramaniam's seemingly keen and unwavering interest in fighting for the *orang asli* cause. The 1st and 8th defendants' contention (and this is supported by the Bar Council) is that Mr Subramaniam had and ulterior motive and had colluded with one Kanawagi all Seperumaniam ('Mr Kanawagi') in instituting the present suit for the sole benefit and interest of Mr Kanawagi and one Dinesh Kanavaji ('Mr Dinesh'). Both are being sued for misusing millions of trust funds and misuse of the 27 units of condominium bought with trust funds in the ongoing 228 and 106 Suits. There is evidence that Mr Kanawagi, Mr Dinesh and Mr Subramaniam are friends. It is also the first and eighth defendants' case that the filing of the present suit was a desperate attempt to strike out criminal breach of trust charges and charges under the

Anti-Money Laundering Act against Mr Kanawagi and Mr Dinesh. In short it was an elaborate scheme by the protagonists to save Mr Kanawagi and Mr Dinesh from their liabilities and wrongdoings in connection with the trust monies and that the filing of the suit had nothing to do with seeking justice for the 163

[50] We are of the view that the judgment in Suit 143 is in respect to the interlocutory application for the plaintiffs' solicitors to discharge themselves. In the course of the hearing of the application, there was extensive evidence adduced to show the involvement of the plaintiffs, the first and fourth defendants, and the 13 appellants in Suit 228 and Suit 106. However, that does not mean that this court should infer knowledge of the 13 appellants regarding their involvement in Suit 228 as representatives of the estate of the two deceased Tok Batins to the extent that it relieves the plaintiffs from its onus of having to serve the substitution order and the amended writ and amended statement of claim dated 3 April 2013 on the 13 appellants.

[51] We agree with the submissions of learned counsel for the 13 appellants that it is a breach of the rules of natural justice for the order dated 22 December 2016 to be made binding on the two Tok Batins who have passed away, and on their estate who have not been served with the substitution order, or the amended writ and amended statement of claim dated 3 April 2013.

[52] There is the plethora of authorities which have held that any order made in breach of the rules of natural justice may be impeached in any proceedings, and is a nullity.

[53] In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 the Federal Court at p 409 stated:

> The Privy Council through Lord Diplock also emphasised that the *courts in England have not closed the door* as to the type of defects in the final judgment of the court that can be brought into the *category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'*. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:
>
> > *The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court* or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that *where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'*. (Emphasis added.)

[54] In *Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor* [1996] 1 MLJ 374, the appellants claimed that they had not been served with a notice of the adjourned hearing. The Federal Court, in allowing the appeal, inter alia, held:

> (1) The rule that the court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except insofar as is necessary to correct errors in expressing the intention of the court, is subject to exceptions, one of which is that an order which is a nullity, owing to the failure to comply with an essential provision such as service of process, can be set aside by the court which made the order in the exercise of its inherent jurisdiction (see p 381A–C); *Craig v Kanssen* [1943] 1 All ER 108 and *United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546 followed.
>
> ...
>
> (4) The effect of the failure on the part of the first respondent to notify the appellants of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the ex parte orders obtained a nullity (see p 3830); *White v Weston* [1968] 2 All ER 842 followed.

[55] In *Zulkiflee bin Abdul Samad v Segi Objektif (M) Sdn Bhd* [2016] MLJU 1333, the Court of Appeal, inter alia, stated in para 9, '(iii) declaratory prayers ought not be granted if all necessary and interested parties are not before the court'.

[56] In *Ang Game Hong & Anor v Tee Kim Tiam & Ors* [2018] 4 MLJ 432, Court of Appeal in para 29 stated:

> Further we were of the view that it is fundamental principle of natural justice, applicable to al courts that a order made without an interested party being given the opportunity to be heard is liable to be set aside ex debito justitiae and must be held as void. See *Cameron v Cole* (1944) 68 CLR 571.

[57] Under O 15 r 9 of the ROC, the court has powers to strike out an action against a plaintiff or defendant who has died. We are of the considered view that the learned judge had erred in proceeding with the trial for Suit 228 knowing full well at the commencement of the trial that the appeal of the plaintiffs in respect of their application for the substitution order was still pending at the Court of Appeal. Subsequently, upon being notified that the Court of Appeal had granted the substitution order to the plaintiffs, the learned judge did not give any directions to ensure that the representatives of the estate of the two deceased Tok Batins were in court before making the order dated 22 December 2016 against them. Such an order made in breach of the rules of natural justice is therefore a nullity.

[58] For the above reasons, we make the unanimous decision that Appeal 220 is allowed with costs. The decision and order of the High Court are set aside. The plaintiffs' claim against the two Tok Batins, ie the second and third defendants, and/or their estate, is in effect therefore dismissed.

Effect of this decision regarding Appeal 220 on Appeal 219 and Appeal 221

[59] With the decision of this court on Appeal 220, the estate of the two deceased Tok Batins would not be bound by the order of the High Court dated 22 December 2016, and be subject to execution proceedings thereof. However, this decision does not affect the consideration of this court of the evidence as a whole in Suit 228 in deciding Appeal 219 and Appeal 221, including any evidence on the role of either or both of the two Tok Batins vis a vis the plaintiffs, and the other appellants.

Appeal 219 and Appeal 221

The position of the first defendant

[60] Before dealing with Appeal 219 and Appeal 221, it is appropriate for us at this juncture to place it on record that the first defendant had in fact filed two appeals against the decision of the High Court in Suit 106 and Suit 228, namely Appeal No J-02(W)-222–02 of 2017 ('Appeal 222'), and Appeal No J-02(NCVC)(W)-223–02 of 2017 ('Appeal 223') respectively. However, due to the lack of sanction from the Director General of Insolvency being obtained by the first defendant, who is now a bankrupt, to maintain these two appeals, the two appeals were previously struck out by this court on 11 December 2017, and on 14 November 2017 respectively. Regarding Appeal 223, the first defendant's application for leave to appeal was struck out by the Federal Court on 26 September 2018. Regarding Appeal 222, similarly the first defendant's application for leave was heard by the Federal Court on 29 October 2018 and struck out. Therefore, as it stands now, insofar as Suit 228 is concerned, the first defendant is bound by the decision of the High Court in that suit, and by the orders of this court regarding Appeal 219 and Appeal 221 where they relate to him, whether as an individual or as a partner of the legal firm, ie the fouth defendant (or 'the firm').

[61] Since the first defendant's two appeals have been struck out by this court, the effect is that the first defendant, having being found liable by the High Court, continues to be liable to date. Thus, any finding and decision by the High Court regarding the first defendant's liability, as a sole proprietor of the firm, and later as a partner of the firm after it became a partnership in 2004 when Dinesh joined the firm as a partner, would continue to bind the first defendant as a partner. This court will also deal with the principle of the 'continuing obligation' of a partner later on in this judgment.

The scope of Appeal 219 and Appeal 221

[62] Pursuant to the High Court order given by Moktar Siddin J (as he then was) dated 5 June 2000 in OS 828, the total judgment sum of RM38,554,111.92 ('actual compensation') was made in favour of the 52 *orang asli*. The same learned judge also made an order as stated earlier in para 10 of this judgment regarding payment of the actual compensation of RM22m and the establishment of the trust for 25 years under the trust deed with Kanawagi, Tok Batin Adong, and Abdul Rahman as the first trustees, and the DG of JHEOA as an additional trustee. The balance of the RM16,554,111.92 was to be paid to the firm, or the fouth defendant, to be distributed to the 52 *orang asli* after deducting all legal fees, costs, consultation fees and expenses incurred for the purpose of, and in connection with the case.

[63] The appellants contended that the plaintiffs are seeking for proper audited accounts to be rendered in respect of only the sum of RM16,554,111.92, and not for other sums.

[64] We note, however, that in the plaintiffs' prayers for reliefs in Suit 228 they had prayed, inter alia, for:

(a) an audited statement of account on the RM16,554,111.92 to be given by the first and fourth defendants to the HSBC trustees (para 83.3F(m));

(b) an audited statement of account with respect to the RM22m to be given by the first and second defendants to HSBC trustees (para 83.3F(q));

(c) as regards the sums received by the third defendant, the third defendant is to provide an account of all monies paid out to him by the first defendant and/or fourth defendant within two days of the order;

(d) special damages as follows:

(i) judgment for RM1m, which is to be paid to HSBC trustees and to be placed in the trust;

(ii) judgment for RM2.2m to be paid to HSBC trustees to be placed in the trust; and

(e) damages to be ordered to be paid by the first to fourth defendants.

[65] In the order dated 22 December 2016, we further note that the High Court had ordered, amongst other, the following sums to be paid under the heading of 'damages' in para 32(ii) of the judgment in Suit 228:

(ii) Damages:

A
(a) The Defendants including Dinesh Kanavaji pay the sum of RM16,054,111.92 to the beneficiaries of the Trust;

(b) The Defendants including Dinesh Kanavaji pay the sum of RM2,716,920.00 to the Trust;

B
(c) The Defendants including Dinesh Kanavaji pay the sum of RM1,057,340.33 to the Trust;

(d) The Defendants including Dinesh Kanavaji pay the sum of RM865,072.04 to the Trust;

C
(e) The Defendants including Dinesh Kanavaji pay the sum of RM27,863.31 to the Trust;

(f) The Defendants including Dinesh Kanavaji pay the sum of RM40,000.00 to the Trust;

D
(g) The Defendants including Dinesh Kanavaji pay the sum of RM5,000,000.00 to the Plaintiffs based on their conduct in abusing and mismanaging the Trust funds involving millions of Ringgit.

[66] From the plaintiffs' pleadings, it is clear that the scope of Suit 228 is not limited to only the RM16,554,111.92, but covers the sum of RM22m, and all
E
other sums stated in the prayers for relief, including the other specific sums of payment which the learned judge had ordered under the heading of 'Damages'.

Whether the plaintiffs' claim is time-barred

F
[67] The fourth defendant submitted that the plaintiffs' claim for accounts from 2000, 2001, 2002 and for the year 2003 is caught by the following s 6(2) of the Limitation Act 1953 which provides a time bar of six years for any action to commence for an account:

G
An action for account shall not be brought in respect of any matters which arose *more than six years* before the commencement of the action.

With respect, we do not think that the plaintiffs' claim is time-barred by virtue of s 22(1) and (2) of the Limitation Act 1953 which provide as follows:

H
22 Limitation of actions in respect of trust property.

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

I
(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation

prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

[68] Contrary to what learned counsel for the appellants submitted, even though the plaintiffs' action is not based on fraud, we note that the cause of action is for breach of trust and constructive trust which resulted in misuse, mismanagement and misappropriation of trust funds (paras 68–70 of amended statement of claim). Therefore, pursuant to s 22(1)(a) and (2) of the Limitation Act 1953, the plaintiffs' claim is not barred by the limitation of six years. Furthermore, for as long as the audited accounts are not rendered to the plaintiffs, the R&M, and/or the trustee to be appointed by the court, it is a continuing cause of action involving a running account of the subject monies which survives the limitation of six years.

The issue on res judicata

[69] The appellants submitted that the learned judge had overlooked that the order dated 5 June 2000 in OS 828 is a final order by the previous High Court which is a competent court of unlimited jurisdiction, and it therefore prohibits the present High Court from reopening the case based on the principle of res judicata.

[70] With respect, we are of the view that this issue raised by the appellants is a non-starter and devoid of merits. As submitted by learned counsel for the plaintiffs, the present High Court was not varying the order dated 5 June 2000, but was in fact giving effect to it, to ensure that the trust monies are kept intact, and not misused, misappropriated or dissipated. The cause of action in Suit 228 is for breach of fiduciary duty of the first trustees, including the constructive trustees ie the fourth defendant, whereas the cause of action in OS 828 is for the placement of the actual compensation, and the establishment of the trust, and all matters related thereto. Res judicata would in no way apply to Suit 228.

The issue on tracing the sum of RM16,554,111.92 and all other sums belonging to the trust fund

[71] The appellants submitted that the sum of RM16,554,111.92 was disbursed by the fourth defendant, with the consent of the two Tok Batins and Abdul Rahman, as follows:

(a) RM6,650,000 paid to senior counsel, Dato' R Rajasingam, being the fees where the sum has been accounted for by the defendants (CS *Jld* 2

p 014195). Dato' R Rajasingam's affidavit affirmed on 29 May 2011 confirmed that he received this sum as his legal fees and expenses in the year 2000 (Tab U *ikatan teras perayu*);

(b) RM500,000 paid to senior counsel, Dato RR Sethu, on 21 July 2010 where the sum has been accounted for by the defendants (CS *Jld* 2 p 014195). Dato' RR Sethu's affidavit affirmed on 5 April 2011 confirmed that he received this sum as his professional fees in the year 2000 (Tab V *ikatan teras perayu*);

(c) RM4,554,111.92 paid to the firm/fourth defendant on 26 August 2010 where the sum has been accounted for by the defendants (CS *Jld* 2 p 014195). Kanawagi's witness statement filed in these proceedings whereby he confirmed receipt of this sum as his legal fees in the year 2000 (Tab W *ikatan teras perayu*);

(d) cheque amounting to RM2.2m issued to Hamzah's wife, Saadiah bt Abd Manaf ('Saadiah'), on the instruction of the two Tok Batins and Abdul Rahman (CS *Jld* 2 p 014195). Hamzah's witness statement filed in these proceedings whereby he confirmed receipt of this sum paid in favour of his wife for his assistance rendered and for introducing the two Tok Batins to Kanawagi (Tab X *ikatan teras perayu*);

(e) the two Tok Batins (second and third defendants) in their affidavit affirmed on 18 January 2010 confirmed receipt of RM2,650,000 (after deducting the amount requested to be paid to Hamzah) in the year 2000, to be distributed to the *orang asli* (Tab BB *ikatan teras perayu*); and

(f) the evidence of the R&M, under cross-examination at the trial whereby he confirmed that the sum of RM16,554,111.92 had been fully expended by the firm/the fourth defendant in the year 2000 (see notes of evidence in *RR Bersama Bhgn B Jld 4* p 680, and *RR Bersama Bhg S Jld* 5 pp 933–937).

[72] Learned counsel for Dinesh submitted that at all material times, Khana & Co was a sole proprietorship with Kanawagi as a sole proprietor. Dinesh only joined Khana & Co in the year 2004. All the monies were fully disbursed by Khana & Co in the year 2000. There is no question of Dinesh having benefitted from the same when he joined the firm in 2004. Dinesh therefore cannot be held liable for restitution of these monies.

[73] In regard to the sums in para 71 above, the appellants submitted that these payments were the subject matter of a criminal case for the offence of criminal breach of trust ('CBT') under s 409 of the Penal Code (11 charges), and for the offence of money laundering under s 4(1)(a) of the AMLA (46 charges) against the first defendant, and against Dinesh for abetment of the first defendant in one CBT charge, and three AMLA charges in the sessions court.

However, the first defendant and Dinesh were acquitted at the end of the Prosecution case without the defence being called.

[74] The appellants relied heavily on a document marked D234 which was the statement of agreed facts ('SOAF') in the criminal case against the first defendant and Dinesh (see judgment regarding Kuala Lumpur Sessions Court Arrest Case No 62–(292–296)–83 of 2012, 62–(922–937)–11 of 2011 in *RR Bersama Bhg B Jld* 54 p 010234 to 010281) where the deputy public prosecutor had signed in agreement to the SOAF (*RR Bersama Bhg C Jld* 100 p 018122–018129 ie statement of agreed facts for the criminal case referred to in the witness statement of Dinesh) on the various payments out of the sum of RM16,054,111.92 for the legal fees of Dato' R Rajasingam, Dato' RR Sethu, and Khana & Co, and to Hamzah and his wife, and to the two Tok Batins and Abdul Rahman for distribution to the *orang asli*.

[75] In this respect, we note that document D234 was merely marked as a SOAF in the criminal court. However, in the present civil proceedings, D234 should not be marked as an exhibit since its contents were seriously challenged by the plaintiffs.

[76] We are of the view that the marking of the SOAF as D234 in the criminal proceedings does not relieve the appellants from the burden of having to prove the truth of the contents of the said document in the present civil proceedings. This is more so since the plaintiffs do not agree that D234 is a SOAF which can apply to the present civil case. In this respect, s 43 of the Evidence Act 1950 ('the EA)' would apply, which means that any judgment, order or decree other than those mentioned in ss 40, 41 and 42 of the EA, are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of the EA.

[77] From the manner that the learned judge considered the various issues to be tried, it is obvious that he was not satisfied that the payment made as stated in D234 are to be accepted at face value. We do not think that he had erred on this point.

[78] After considering all the evidence adduced before him, the learned judge made specific findings which included the following.

[79] The first trustees appointed by the court ie the first defendant, Abdul Rahman (not a party), and the second defendant, being trustees, owe a fiduciary duty to the plaintiffs.

[80] Vide the order dated 5 June 2000 in OS 828, the trustees shall also comprise the DG if he is willing to accept the office.

[81] Both parties submitted extensively on whether the DG was in the first place invited to be trustee of the trust. In our view, it is not material whether the DG was invited or otherwise by the first trustees to be a trustee. The learned judge rightly concluded that since the DG was not a trustee, the trust was in fact not properly constituted.

[82] We are of the opinion that without the DG being made a trustee as required by the order dated 5 June 2000, the first trustees ought to have applied to the court for liberty to dispense with the mandatory requirement of having the DG acting as a trustee. We observe that this was not done. Thus the learned judge was not wrong when he held that the first trustees had a free hand over the actual compensation which was paid entirely out to the fourth defendant by the Johor State Government. They had not rendered proper audited accounts of all payments made and therefore they had breached their fiduciary duty to the plaintiffs who are beneficiaries to the trust. Further, they had beached the trust when they committed various acts which amounted to misuse, mismanagement and misappropriation of the trust fund.

[83] Pursuant to cll 8.1 and 8.2 of the trust deed, the trustees were required to prepare by a certified public accountant certified financial statements in each financial year, and shall establish and maintain proper accounts in books or computer from which shall be recorded accurately all receipts and outgoings, income and capital in relation to the trust fund. However, this was not done. Initially, the first defendant merely gave photostat copies of payment vouchers and no other documents or originals.

[84] The learned judge rightly concluded that the fourth defendant is a constructive trustee of all the trust funds which were disbursed through the firm. The fourth defendant therefore owes a fiduciary duty to the plaintiffs as beneficiaries. Further, the first and fourth defendants, by virtue of them being the solicitors for the plaintiffs in OS 828 owe a fiduciary duty to the 21 plaintiffs therein who form part of the 52 *orang asli*.

[85] The learned judge made a finding that the first defendant, when testifying, could not produce evidence of the third defendant being appointed as a trustee. Despite that, the third defendant was held out to be a trustee of the trust and he signed various documents which affected the trust such as the memorandum of understanding ('MOU') (pp 1692–1701 of D8), each copy of the sale and purchase agreements for the 27 units of apartments (pp 158–366 of 02 and 367–560 of D3) (note: this is the subject matter of Suit 106), letters from the trust to Messrs Sharifah & Associates (p 654 of 04 and p 1675 of D8), letters from the trust to Virgin Properties (pp 1621 and

1685 of D8) (Virgin Properties is defendant in Suit 106), and resolutions of the trust dated 21 January 2008 and 14 July 2007 (pp 591–592 of D3), which the learned judge correctly ruled as void.

[86] In addition, the learned judge found that the third defendant had allegedly affirmed statutory declarations, together with the second defendant and Abdul Rahman that he received trust monies amounting to RM3,639,671.60, purportedly to be distributed to the beneficiaries of the trust (exhs D48, D49, D5D, D51, D52, D53, D54A and D548). The learned judge found that it was odd that the third defendant received trust monies when he was not entitled to such monies. Therefore, the third defendant had been unjustly enriched. The learned judge concluded by holding that the first and second defendants, as trustees, were to be jointly and severally liable for the sum of RM3,639,671.60.

[87] Based on the evidence, the learned judge further found that since the inception of the trust, the plaintiffs have requested for information and accounting on the trust from the first defendant (as trustee), and from the fourth defendant (as constructive trustee), on the details of the actual compensation which consists of the sum of RM22m constituting the trust, and the sum of RM16,554,111.92.

[88] In regard to the MOU (exh P83), we note the submissions of the plaintiffs that it is an incomplete document produced in court. Clauses 7 and 8 of the MOU refer to 'Lampiran A' which was not produced in court.

[89] The learned judge held that the MOU is an afterthought and was fabricated by the appellants. It was not mentioned in the defence. The first defendant, under cross-examination, stated that the MOU was destroyed in the fire which happened at the fourth defendant's office in May 2007 (NOP Vol 43 p 62 and pp 90–95). In fact, the learned judge observed that the MOU was not even produced by the first defendant when he had to justify the defendants' position with regard to the RM16,554,111.92 to the proceedings of the Advocates and Solicitors Disciplinary Board which was set up in 2004. In any case, the learned judge found that the MOU is illegal and thus void since it contemplates payment of legal fees only in the event of success in any suit, action or proceedings and this is contrary to s 112(1)(b) of the Legal Profession Act 1976.

[90] The learned judge emphasised that the defendants have a duty to properly account for all sums billed, and cannot simply make lump sum payments without proper invoices for any service allegedly rendered.

[91] The learned judge could not accept the alleged vouchers produced by the defendants which stated lump sums, but do not show any details of work done. He found the alleged vouchers highly suspect, as they did not bear the letterhead of the fourth defendant, Dato' R Rajasingam and Dato' RR Sethu (NOP Vol 43 pp 79–107).

[92] The learned judge further noted that the defendants failed to provide any details on the alleged foreign consultants who were apparently engaged to provide assistance in OS 828 (NOP Vol 43 p 123, and NOP Vol 44 pp 29–32).

[93] More importantly, the learned judge found that the defendants did not provide any evidence that consent was obtained from the plaintiffs for the monies to be paid to the fourth defendant, Dato' R Rajasingam, Dato' RR Sethu, and the alleged foreign consultants.

[94] We are also of the view that the learned judge was correct when he concluded that the defendants had no authority to make payment of RM2,200,000 out of the RM16,554,111.92 to Hamzah and his wife, Sa'adiah, for two reasons:

(a) the trust order only allowed for payment of 'legal fees, costs, consultation fees and expenses'. There is no evidence that Hamzah is a lawyer or a consultant who should be entitled to such payment, more so when there was no legitimate invoice or bill to require such monies to be paid. The learned judge considered the evidence of Hamzah himself when he testified that there was an agreement to pay him 15% of the compensation awarded. He stated that he helped the orang asli to write several letters, and he drove the Tok Batins to Kuala Lumpur several times (NOP Vol 52 pp 76–80); and

(b) the defendants never obtained the consent of the 52 orang asli regarding this payment.

In the light of all the evidence adduced, we do not think that the learned judge had erred in holding that the defendants had misused, mismanaged and misappropriated trust funds.

[95] Further, the learned judge found that the accounts that were finally furnished by the defendants to the plaintiffs were unaudited/uncertified financial statements which contained a qualification by the defendants' accountant that the accounts were unaudited (the respondents' core bundle (1) p 401).

[96] The plaintiffs then engaged Folks Corporate Services Sdn Bhd ('Folks') to furnish a report as to their opinion on the defendants' unaudited accounts.

The learned judge considered the report prepared by Folks (exh D43) and noted the findings of Folks which, inter alia, stated:

(a) that between the year 2000 to 2006, the unaudited/uncertified financial statements of the defendants stated that the sum of RM5,511,457 was paid to the beneficiaries. However, a sum of less than RM2,778,300 was instead received by the beneficiaries;

(b) that no details of legal fees, costs, consultant fees and expenses with regard to the payment of RM16,554,111.92 as legal fees (45.29% of the actual compensation) have been furnished by such unaudited accounts; and

(c) that a sum of RM2,716,920 was not accounted for. This sum was purportedly paid to the three village headmen, ie the two Tok Batins and Abdul Rahman, for distribution to the beneficiaries. However, the plaintiffs, as beneficiaries, were not aware of it, and have not received such sums.

[97] The learned judge stated that the defendants have failed to account for the RM16,554, 111.92 which was paid into the fourth defendant's account on or about 13 July 2000. It is the plaintiffs' case that there was an agreement between the first defendant and the two Tok Batins and Abdul Rahman which entitled the first defendant to legal fees of only RM500,000, and not RM4,554,111.92 as he was paid, should he win the case in OS 828. We are of the view that the learned judge is correct to hold that the defendants are required to account for the balance from the RM16,054,111.92.

[98] The sum of RM2,716,920 was the excess interest derived from the trust fund of RM22m every month. The learned judge made a finding that there was also a standing instruction by the first defendant for Agro Bank to transfer the remainder of each month's interest, derived from such trust fund, into his personal account (NOP Vol 42 p 10). In our view, it is clear from the evidence adduced by the plaintiffs that there is no accountability, and no proper audited accounts submitted to the trust of the RM22m, including all interests earned on such amount, by the first trustees, in particular the first defendant, and by Khana & Co.

[99] Based on the evidence, we are of the considered opinion that the learned judge did not err in fact or in law in deciding that the defendants owe a fiduciary duty, whether as trustees or constructive trustees, to the trust, and they have beached such fiduciary duty. Therefore, they are liable for all sums which have been misused, mismanaged and/or misappropriated from the Trust funds, and the defendants are liable to reimburse the trust all such sums. However, in our view the exact sums payable to the plaintiffs have to be identified and confirmed from audited accounts of the same.

[100] The learned judge also made a finding that sometime in 2008, RM7m was withdrawn out of the trust fund and used to purchase 27 units of Lanai Gurney Apartment. In fact, the learned judge stated that there is no dispute on this.

[101] At this juncture, we wish to state in clear terms that the matter regarding this sum of RM7m, and the plaintiffs' claim on the 27 units of apartments, and an additional 30 units, will be dealt with in a separate judgment of this court on the remaining five appeals filed against the decision of the same learned judge in respect of suit 106.

The liability of the parties in the firm/fourth defendant, including Dinesh

[102] The appellants' position is that the sum of RM16,554,111.92 paid by the Johor State Government to the fourth defendant was already distributed in the manner as stated in para 66 of this judgment.

[103] The appellants therefore contended that the aforesaid sum of RM16,554, 111.92 was *fully disbursed by 26 August 2000* as set out above, and thereafter the role of the first defendant and the fourth defendant, as solicitors for the *orang asli*, came to an end.

[104] Dinesh maintained that he only joined the firm, Khana & Co, ie the fourth defendant, as a partner on 2 January 2004, and he had no involvement in the firm prior to that. The subject monies were deposited by the firm and thereafter disbursed fully by 26 August 2000 before Dinesh joined the firm as a partner. Thus, any cause of action against the firm, if at all, arose when Dinesh was not a partner of the firm.

The law of partnership

[105] Section 11 and 19(1) of the Partnership Act 1961 ('the PA') provide as follows:

> s 11:
>
> Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm *incurred while he is a partner;* and after his death his estate is also severally in a due course of administration for such debts and obligations, so far as they remained unsatisfied but subject to the prior payment of his separate debts. (Emphasis added.)
>
> s 19(1):
>
> A person who is admitted as a partner into an existing firm *does not thereby become liable* to the creditors of the firm *for anything done before he became a partner*. (Emphasis added.)

[106] Dinesh therefore submitted that pursuant to ss 11 and 19(1) of the PA, he is not liable for all the debts and obligations of the Firm regarding the sum of RM16,554,111.92, and even for the RM22m. Since any liability incurred before he was a partner, he cannot be liable for anything done before he became a partner.

[107] We note, however, that the learned judge, after considering s 11 of the PA, held that while the general proposition of the law would not hold Dinesh liable for the liabilities of the fourth defendant prior to his joining the same as a partner, the exception for the rule is found in the Court of Appeal case of *Oriental Bank Bhd v Nordin Hamid & Ors* [2010] MLJU 1905; [2011] 5 CLJ 237 where Zaharah Ibrahim JCA (as she then was) at p 252 stated as follows:

> With respect, I am not persuaded by this argument It is true that when the legal firm received the monies from the High Court and the District Land Administrator the fourth respondent then was not yet a partner of the firm. However, it is significant to note that, even after the fourth respondent had joined the legal firm on 1 June 1996, the monies were still not handed over to the rightful owner, the appellant; and the monies (except in respect of the net proceeds of the account of Faridah which were remitted to the appellant very late on 23 December 1997) were still not remitted to the appellant even after two notices of demand were issued, namely (1) by the appellant's Head of Legal Unit on 14 January 1998, and (2) by the appellant's solicitors on 28 June 1999. In my judgment, in the circumstances of the case, the fourth respondent is still liable in respect of the firm's obligation to make restitution to the appellant by reason of s 11 of the Partnership Act The legal obligation of the legal firm to make restitution did not cease at the time the fourth respondent joined the legal firm (1 June 1996). So long as the monies were not remitted to be appellant, meaning that so long as the legal obligation to make restitution in respect of the net proceeds was not carried out by the legal firm, that legal obligation persists; and that legal obligation was still continuing at the time the fourth respondent joined the firm on 1 June 1996, and even thereafter. In my judgment, the phrase 'obligations of the firm incurred while he is a partner' in s 11 of the Partnership Act ought to be interpreted to include this continuing obligation. In interpreting s 11, it must be borne in mind that the legal firm benefitted by retaining the appellant's monies. The legal firm was a partnership. The fourth respondent was a partner in that partnership with effect from 1 June 1996. Thus, he too, as a partner of the firm (the partnership), benefitted from the unlawful retention of the monies from the day he joined the partnership. Therefore, it would not be justified if s 11 were to be narrowly interpreted in a manner that would absolve the fourth respondent from the firm's legal obligation to make restitution in respect of those monies.

[108] Learned counsel for Dinesh cited a few authorities before us to support his proposition that an individual partner is only liable for debts and/or obligations of the firm that were incurred during the period in which he was a partner of the firm and the cause of action arose (see High Court cases of *Leong Sing (sued as a firm) v Perusahaan Kuari (Melaka Pindah) Sdn Bhd (formerly*

known as Malacca Lian Hwa Sdn Bhd [1997] 5 MLJ 657 and *Guthrie Property Development Holding Bhd v Baharuddin bin Hj Ali & Ors* [2011] 3 MLJ 416, and the India case of *Noor Mohammed v Hill Produce Trading Co, Badagara & Ors* [1980(1)]India Law Report 303).

[109] From the authorities cited by both parties, we would highlight two Court of Appeal decisions.

[110] In *Lee Choon Hei v Public Bank Bhd and another appeal* [2017] 3 MLJ 441; [2017] 7 CLJ 438, Harmindar Singh JCA stated as follows:

> it must follow that the plaintiff does not need to prove all over again all the causes of action that are merged in the judgment against the firm because the nexus between the appellant and the judgment is the all-important fact that the appellant was a member of the firm at the time when the plaintiffs cause of action accrued against the firm. Thus, as soon as the plaintiff shows that the appellant was a member of the firm when the cause of action accrued, the appellant is liable.

[111] In *Alan Michael Rozario v Merbok MDF Sdn Bhd* [2010] MLJU 1331; [2011] 1 CLJ 433, at p 443 Segara JCA stated as follows:

> Notwithstanding the statutory declaration of the first defendant admitting that she is wholly to account for the RM1m, and attempting to absolve and exonerate the second defendant of any wrong doing over the Stakeholders Money, it is undisputed that when the Stakeholders Money was paid into the account of Suhaiza & Partners and subsequently withdrawn, the second defendant was a partner of the legal firm.
>
> We are unanimous that the allegations that the second defendant was not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter, does not absolve him in Jaw, under the Partnership Act 1961, of his liability as a partner of the firm of Suhaiza & Partners, at the material 'time'.

[112] In the *Law of Partnership in India* (5th Revised Edition) by SD Singh, JP Gupta and VP Verma, the learned authors, when dealing with the liability of a partner, at p 389 stated the following:

> The liability of a partner commences only from the time he becomes a partner. He cannot as such be held liable prior to the date he became a partner. Similarly the firm also cannot be held liable for the acts of a partner before he became member of the firm.

[113] We are in agreement with the principles set out in the authorities cited by learned counsel for Dinesh. However, we do not agree with his submission that the decision in *Oriental Bank* was decided per incuriam because the Court of Appeal in that case appears to suggest that in certain circumstances, an incoming partner can be liable for an existing debt of a partnership firm, and the Court of Appeal made no reference whatsoever to s 19(1) of the PA in coming to its decision.

[114] Learned counsel for Dinesh further submitted that in our present case, the firm had already received the sum of RM16,554,111.92 and such sum had already been disbursed in full, well before Dinesh joined the firm as a partner. There was therefore no question of Dinesh having benefitted from the monies as was the case in *Oriental Bank*.

[115] With respect, we do not think that the Court of Appeal had decided *Oriental Bank* per incuriam. The facts of that case are such that there clearly arose a continuing obligation of the partner as spelt out by the court in that case. In our opinion, in the present case, the learned judge did not err in deciding that there is a continuing obligation by the fourth defendant to compensate the plaintiffs for all losses incurred as a result of the firm's refusal and/or failure to account for the RM16,554,111.92. We agree with the submissions of the plaintiffs that the failure by the firm to account for sums received on behalf of its client in its accounts does not cease to exist by virtue of the incoming or outgoing of an individual.

[116] Section 12 of the PA provides that the firm, as opposed to an individual partner, is under an obligation to make good any loss or injury caused to any person acting in the course of the business of the firm. It reads as follows:

> 12 Liability of firm for wrongs
>
> Where, by any *wrongful act or omission of any partner acting in the ordinary course of the business of the firm* or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act. (Emphasis added.)

[117] Thus, in our view for as long as sums which rightfully belong to the trust fund are not paid back by the fourth defendant, and for as long as audited accounts are not rendered by the fourth defendant to the plaintiffs, the firm, together with its partners including Dinesh, are liable for such debts and/or obligations even if Dinesh only joined the firm on 2 January 2004. In our view, from 2 January 2004 onwards, Dinesh is liable as a partner for any act or omission which is the legal obligation of the firm for as long as such obligation has not been discharged.

[118] In this respect, we agree with the following submissions of learned counsel for the plaintiffs:

> 87. To adopt a different interpretation of the provisions of the Partnership Act 1961 would produce an absurd and unjust result. This would allow partnership firms to escape liability if a culpable partner leaves the firm to be replaced by an incoming partner who would have the free hand of 'unknowingly' benefitting from the monies that remain in the accounts of the said firm — by simply invoking s 19. As per Hishammuddin J (as he then was) in *RBOA Vol 4(2) Tab 25, Southern Empire*

Development Sdn Bhd v Tetuan Shahinuddin & Ranjit & Ors [2008] MLJU 60; [2008] 5 CLJ 195:

> [17] In my judgment, because in law the liability of the firm is distinct from that of the partners, therefore, the liability of the firm is not affected by any partner ceasing to be a partner of the firm. *Although the particular errant partner has long left the partnership, the liability of the firm still continues* — subject only to any law pertaining to limitation of actions.
>
> [18] This, to my mind, must be the correct interpretation of the law pertaining to partnership; otherwise there will be chaos in the commercial world; *for, if the first defendant's proposition were to be accepted, then a partnership which has incurred a liability can easily exonerate itself from that liability simply by asking the particular errant partner in question to leave the firm*. Surely, this cannot be the law.

88. *In the present case, the RM16m was not entrusted specifically to the first appellant as trustee but to the firm, the fourth appellant. The obligation of the firm therefore remains until the sum is repaid. Zaharah Ibrahim JCA (now CJM) in Oriental Bank Bhd:*

> [62] *In this case, the money was not entrusted to any particular partner as trustee. It was received by the firm. It is in the context of receiving the money and holding the money on behalf of the appellant with an obligation to hand over the money to the appellant that the 'trust' arose. In fact, in para. 16 of their amended statement of defence, the second and third respondents admit that their role was as trustees ('memegang peranan sebagai pemegang amanah').* (Emphasis added.)

[119] Thus, as constructive trustees, the firm, including Dinesh, are liable as decided by the learned judge. We do not think that the learned judge had erred in stating 'including Dinesh' in several instances in his judgment when he found the fourth defendant liable. In our view, the learned judge was placing on record his findings of fact on Dinesh's involvement and liability as a partner. However, we do not think that the words 'including Dinesh' must necessarily be stated in the court order. This is because by operation of the law of partnership, any reference to the fourth defendant, which is a partnership, would automatically bind all its existing partners at the material time, including Dinesh. We are informed that the firm has been closed down. Nonetheless, the obligations and liability of its partners will continue until they are fully discharged.

WHETHER THE JUDGMENT OUGHT TO BE IMPUGNED

[120] The appellants submitted extensively at the outset of this hearing that the judgment of the High Court ought to be impugned for the reason that the learned judge considered mainly the submissions of the plaintiffs and adopted extensively those submissions as his judgment, without giving due consideration to the evidence and submissions of the appellants. The appellants submitted 'Annexure A3' (in yellow) (note: p 1 of Annexure A3 was

withdrawn in court by Mr TA Sivam, learned counsel for the appellants, on 11 July 2018) to show the various parts of the judgment where the learned judge had adopted almost wholly or a greater part of the submissions of the plaintiffs, and had only added very few of his own words which were highlighted to this court in pink. They further submitted a comparative chart to show four examples of where the learned judge had failed to consider the defendants' submissions.

[121] The leading authority on this issue, and whether miscarriage of justice has been caused by extensive adoption of mainly one party's submissions can be found in the case of *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351; [2013] 4 CLJ 901 where the Federal Court, in a review application, when deciding the issue of alleged copying or 'plagiarism' by the court in its grounds of judgment, inter alia, stated the following:

At p 918:

[24] The Columbia Court of Appeal in that case allowed the appeal and ordered a new trial. However, the dissenting view of K Smith JA is highly relevant for our consideration where in paras 29 and 30 he said:

> [29] The question, then, is whether a reasonable and informed person, considering all the circumstances, would apprehend that the trial judge failed to independently and impartially consider the evidence and the law and to arrive at his own conclusions on the issues.
>
> ...
>
> [30] I would add that there is nothing inherently wrong with adopting the submissions of a party in whole or in part as reasons for judgment so long as those submissions truly and accurately reflect the Judge's own independent analysis and conclusions. Trial judges are busy, and there can be cases, of which Gaudet and Ni-Met Resources Inc. are examples, where a party's submissions so accurately reflect the trial judge's reasoning that nothing would be gained by postponing other pressing work in order to rewrite the reasoning and conclusions in the judge's own words. However, judges who are tempted to prepare reasons for judgment in this way should be acutely aware they may create a perception that they did not reach their decisions independently. Such a perception would tend to undermine public confidence in the impartiality and independence of the judiciary generally and would bring the administration of justice into disrepute: *R v S (RD)* at para 111.

[25] *The approach taken by K Smith JA is that, it does not follow that where the trial judge was found to have adopted the submissions of a party, the judgment should automatically be set aside. We need to consider further, whether on its proper analysis the judgment truly and accurately reflects the judge's own independent analysis and conclusions.* (Emphasis added.)

At pp 921–922:

A [29] A similar issue was raised before our Court of Appeal in the case of *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636; [2010] 7 CLJ 808. In that case, the issue of wholesale copying of counsel submissions was raised as a point of appeal. Abdul Hamid Embong JCA (as he then was) approached the issue in the following manner:

B

> [4] Learned counsel for the appellant in the opening remarks of his submission criticised the judge for almost totally adopting the submission of the respondent as his grounds of judgment. A comparative table of the judgment matching with the parallel passages in the respondent's submission was presented to us to press home the point that the learned judge had completely ignored the submission of the appellant. While we do not approve of the method adopted by the learned judge in producing his judgment, we say that this itself cannot be basis to strike down that judgment, although it was strongly urged by the appellant, that judgment was flawed in not considering the counter arguments of the appellant. These flaws were presented to us as the grounds of this appeal which we now consider.

C

D

> [30] *The Court of Appeal expressed its disapproval of the method adopted by the judge in substantially copying the submissions of counsel but held that in itself cannot form the basis to strike down the judgment. The court then went on to allow the appeal on substantive merit.* (Emphasis added.)

E

[122] Coming back to the present case, we have deliberately decided to address this issue of copying the plaintiffs' submissions towards the later part of this judgment, and not at the beginning, for the reason that as we go along in the consideration of the judgment with a fine toothed comb on all the issues,
F we are of the considered opinion that while it is true that the learned judge had adopted chunks of the plaintiffs' submissions in the court below, he did consider all the oral and documentary evidence adduced before him thoroughly and he did consider both the case of the plaintiffs and the case of the defendants in totality, and in great detail.

G

[123] We observe that the submissions of both parties are in English, whereas the learned judge had written the judgment in the Malay language. Thus, it cannot be said that the learned judge did wholesale copying of the plaintiffs' submissions. In our view, he merely agreed with and therefore
H adopted more of the plaintiffs' submissions. We find that the learned judge, having the benefit of hearing all the witnesses and examining all the documents before him in the lengthy trial, which spanned over the period from 1 October 2012–23 May 2016, had fully appreciated the facts, the evidence and law. We are of the considered opinion that the learned judge had independently made
I his own analysis of the evidence, arrived at his own findings, and then made his decision and orders on each issue for trial based on the law. The learned judge was more convinced by the evidence adduced by the plaintiffs' witnesses, whom he found to be more credible. He found that the defendants' witnesses, in particular the first defendant, Hamzah and Dinesh, were untruthful and

lacked credibility. He therefore held that the plaintiffs have proved their case. We agree with decided cases that it is not a good practice for the learned judge to copy and/or adopt more of one party's submissions, but that cannot be the basis to impugn and strike down the whole judgment. On the whole, from a careful perusal of the judgment, we are satisfied that the learned judge did apply his mind objectively to the case before him, and there was no lack of judicial appreciation, or any judicial misappreciation of the facts and the law. We find that the learned judge was not plainly wrong, and thus we hold that the judgment is valid and ought to be preserved.

RELIEFS TO BE GRANTED

[124] We agree with the submissions of the defendants that the learned judge did not grant the reliefs sought by the plaintiffs. What the plaintiffs had prayed for in Suit 228 can be summarised as follows:

(a) removal of the first and second defendants as trustees of the trust, and replacing them with HSBC trustee as the trustee;

(b) various injunctive reliefs against the first and second defendants;

(c) statement of accounts to be furnished by the first and fourth defendants in respect of the sum of RM16,554,111.92 compensation paid by the Johor State Government and thereafter payment of all sums due on the taking of the accounts;

(d) statement of accounts to be furnished by the first and second defendants in respect of the sum of RM22m compensation paid by the Johor State Government, and thereafter payment of all sums due on the taking of the accounts;

(e) the third defendant to furnish an account of all monies paid out to him by the first and/or fourth defendants; and

(f) damages (including special damages) and costs on an indemnity basis as against and defendants.

[125] However, the learned judge granted orders and declarations which altered, varied, and/or amended the reliefs sought which are different from what were prayed for by the plaintiffs. The defendants contended that the High Court had no jurisdiction to grant any relief to the plaintiffs that have not been specifically pleaded.

[126] A glaring instance would be the extensive declarations made by the learned judge on the liability and obligations of the various defendants, including Dinesh, in paras (a)–(k) of the order dated 22 December 2016 (pp 10–11). Furthermore, in paras (l)–(r), the learned judge ordered various

sums of money to be paid by the various defendants, including Dinesh.

[127] Learned counsel for the plaintiffs submitted that the learned judge could grant those reliefs which have not been pleaded under the omnibus clause at the end of the plaintiffs' prayers which prayed for:

> Further or other relief
>
> (v) such further and/or other relief deemed fit and appropriate by this Honourable Court to so grant.

[128] Here, both parties submitted comparative tables to show where the learned judge had been consistent with, or had departed from the pleadings.

[129] After examining the reliefs prayed for by the plaintiffs, and the reliefs granted by the learned judge, we are of the view that indeed the learned judge had departed from the pleaded reliefs and had given other reliefs which he thought appropriate.

[130] Learned counsel for the plaintiffs submitted that the findings of the learned judge are in accord with the pleadings, and the reliefs granted are consistent with the pleaded case and are covered by the facts and issues in the pleadings. The court also has the jurisdiction to mould relief under prayer (y) of the amended statement of claim in accordance with the suitability and justice of the case, as well as the findings of the court and the evidence led. There is an abundance of case law on the court's power to mould relief.

[131] In *Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v Balakrishnan a/l Kaliannan* [2013] 6 MLJ 149, the Federal Court at p 158 stated:

> [19] Lastly it was submitted (by the plaintiff) that the term 'proceeding' in s 11 of the Civil Law Act 1956 should not be narrowly interpreted. The term must be defined to include the whole gamut from pleadings to judgment. *The judgment finally determined what the nature of the proceeding was regardless of what labels or categories the parties put up. The relief or remedy that a judge orders may be different from what the parties asked but that remedy is what defines the proceeding* ...
>
> ... *[21] With respect I am unable to agree with the contention by the defendant that the proceeding tried in the High Court was not for the recovery of any debt or damages, as the remedies sought by the plaintiff were for rescission of the agreement, for the deposit of M250,000 to be forfeited, for rectification of the land register and for damages. It is to be noted that in prayer (G) of his statement of claim the plaintiff prayed for 'Lain-lain dan/atau apa-apa relif dan/atau perintah berlainan atau berlanjutan yang Mahkamah Yang Mulia ini fikirkan suai dan manfaat'. (Any other or further relief or order which this Honourable court deems fit): This omnibus prayer must not be treated as a mere ornament to pleadings devoid of any meaning (see Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156. In *Tan Tek Seng v Suruhnjaya Perkhidmatan Pendidikan*

[1996] 1 MLJ 261 Gopal Sri Ram JCA at p 301 said:

> In his statement of claim, the appellant has also prayed for 'further or other relief as this honourable court thinks fit'. In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 at p 160, a prayer in a statement of claim reads' Any other relief which this Honourable court deems fit to grant'. Salleh Abas FJ (as he then was) said that this prayer 'must not be treated as a mere ornament to pleadings devoid of any meaning'.

I am of the view that the same may be said of the like prayer in the present case. *This court should, in my judgment, award the appellant such relief as is appropriate in the circumstances of the case.* (Emphasis added.)

[132] In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771, the Court of Appeal at pp 814–815 further stated:

> As it happens, there is, in the present case, no inconsistency between the relief which I propose to award to the appellant and the other relief he has expressly claimed. For that reason, I abstain from deciding this case upon my own view of the wider role which, *I believe, courts should play in moulding relief to suit the justice of a particular case,* especially in the field of public law. (Emphasis added.)

[133] As for the declaratory reliefs, learned counsel for the plaintiffs submitted that the court's power to grant declaratory judgments, being a discretionary and equitable remedy, is not subject to reliefs claimed by the parties but rather based on the circumstances of the case, provided that the party seeking the same pleads the omnibus prayer and the basis of the reliefs are sufficiently supported by the facts and issues in the pleaded case.

[134] Learned counsel for Dinesh relied on the Federal Court case of *Shirley Kathreyn Yap v Malcolm Thwaites* [2016] 5 MLJ 602 at p 620; [2016] 8 CLJ 765 at p 780, Md Raus Shariff PCA (as he then was) stated:

> As stated earlier, the plaintiff's pleaded case is for an accounting order. However, the plaintiff at the end of the trial abandoned his prayer for an accounting. This can be seen from the trial judge ground of judgment which reads:
>
> > At the conclusion of the trial, the plaintiff abandoned his prayer in paragraph 60(a) of his ASOC for an accounting of income generated from the various horse racing partnership which was received by the defendants as trustee for the plaintiff as the registered manager and nominee of the plaintiff.
>
> [51] Under such circumstances, we are of the view that the trial judge after having found that the plaintiff had abandoned his prayer for an accounting, ought to have dismissed the plaintiffs claim. There was no cause of action left.

[135] We agree with the submissions of learned counsel for the plaintiffs that

A the present case can be distinguished. In *Shirley*, at the end of the trial, the plaintiff had abandoned his prayer for an accounting order. However, in the present case, the plaintiffs have never abandoned their prayer for audited accounts to be produced. As such, the plaintiffs' claim ought not to be dismissed.

B

[136] We note that the reliefs granted by the learned judge are inconsistent with the reliefs prayed for. From the opening statement of the plaintiffs' counsel at the commencement of the trial at the High Court, it is clear that the plaintiffs seek mainly for audited accounts to be submitted by the defendants
C to the plaintiffs, and if there is found any sums to be paid, then such payment have to be made.

[137] We further note that instead of appointing HSBC trustee as the
D trustee to take over from the R&M, as prayed for by the plaintiffs, the learned judge ordered that the R&M continues in carrying out its responsibilities until application is made by the R&M and/or the plaintiffs for the R&M to be discharged

E **[138]** We are also of the view that the order of the learned judge in ordering various specific sums to be paid by various defendants to the plaintiffs is inconsistent with the plaintiffs' primary prayer for audited accounts to be submitted by the defendants. It would therefore be premature for such sums to be paid even before the audited accounts are submitted. There would be a
F possibility that inaccurate sums of money would be paid without a proper audit.

[139] In our opinion, while the learned judge's findings on liability are correct, the learned judge ought not to have granted the varied reliefs. We take
G into consideration the submissions of learned counsels for the appellants, and learned counsel for the 26th plaintiff, for the order of the High Court to be substituted with an order for audited accounts to be submitted, and for HSBC trustees to be appointed to replace the R&M.

H DECISION

[140] Having heard the submissions of respective learned counsels, and perused the records of appeal, we make the following unanimous decision:

I (a) as stated earlier in para 58 of this judgment, Appeal 220 is allowed with costs. The decision and order of the High Court in respect of the second and third defendants and/or their estate are set aside;

(b) the two appeals in Appeal 219 and Appeal 221, on liability, are dismissed with costs. However, the two appeals in respect of the reliefs to be granted

are allowed in part. The orders of the High Court are set aside and substituted with orders which are prayed for in para 83.3F of the amended statement of claim with the following modifications or exceptions:

(i) all references to the liability of the second and third defendants are to be deleted;

(ii) the appointment of HSBC trustee to replace the R&M would be effective two months from the date of this order. In the event that HSBC trustee declines the appointment, the plaintiffs shall have liberty to apply to the High Court for an alternative trustee to be appointed. The R&M shall hand over all matters to HSBC trustee, or the alternative trustee to be appointed by the court, within three months from the date of this order;

(iii) since Folks is not an auditing company and would not be able to serve as an auditor, HSBC trustee, or the alternative trustee to be appointed by the court, shall appoint an independent auditor which has been approved by the court;

(iv) regarding prayer (q), the 30 days is substituted with six months from the date of this order. Liberty to apply;

(v) prayer (v) for special damages is not allowed;

(vi) prayer (w) is allowed;

(vii) prayer (x) on damages is allowed subject to the specific sums being identified and confirmed after the audited accounts have been submitted to HSBC trustee, or the alternative trustee to be appointed by the court; and

(viii) prayer (y): the order on costs awarded by the High Court is affirmed.

Further order of this court

[141] Upon the audited accounts being submitted to HSBC trustee, or the alternative trustee to be appointed by the court, and where it is found that certain payments are to be made by the first defendant and/or the fourth defendant, upon any demand made by HSBC trustee, or the alternative trustee to be appointed by the court, for such sums to be paid, the first defendant and/or fourth defendant are, pursuant to this order, ordered to pay such sums forthwith to the trust. In this respect, we place on record the undertaking of Dinesh and the fourth defendant made in their submissions that should this court, instead of the reliefs granted by the learned High Court judge, order that

audited accounts be submitted to HSBC trustee, or the alternative trustee to be appointed by the court, they undertake to make all payments found owing or due to the Trust.

COSTS

Appeal 220

[142] Costs of RM20,000 are to be paid by the respondents to the appellants, subject to payment of the allocator fee.

Appeal 219 and Appeal 221

[143] Costs of RM50,000 for each appeal are to be paid by the respective appellant to the respondents, subject to payment of the allocator fee.

DEPOSIT

[144] All deposits are to be refunded.

Order accordingly.

Reported by Ashok Kumar